

82-1907

Office - Supreme Court, U.S.

FILED

MAY 25 1983

No. _____

~~ALEXANDER L. STEVENS,~~
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

MISSISSIPPI POWER COMPANY,
v. *Petitioner,*

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
INTERNATIONAL PAPER COMPANY,
THE UNITED STATES OF AMERICA,
Respondents.

**PETITION OF MISSISSIPPI POWER COMPANY
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI**

JAMES S. EATON
(Counsel of Record)

BEN H. STONE
EATON, COTTRELL, GALLOWAY
& LANG
2300 14th Street
P. O. Drawer H
Gulfport, MS 39501
(601) 864-2682

HASSELL H. WHITWORTH
WATKINS & EAGER
800 Bankers Trust Plaza Building
P. O. Box 650
Jackson, MS 39205
(601) 948-6470

*Attorneys for
Mississippi Power Company*

May 25, 1983

QUESTION PRESENTED

In a rate case filed by Petitioner, Mississippi Power Company (MPC) in October, 1980, the Mississippi Public Service Commission (MPSC) removed from MPC's rate base the sum of \$20,000,000 which MPC had invested in a coal-fired electric generating plant in Jackson County, Mississippi, known as "Plant Daniel." On appeal in a sharply divided opinion (5-3), the Mississippi Supreme Court affirmed the action of MPSC.

Petitioner contends the question presented to this Court is: "Did the action of MPSC and the approval of such action by a majority (5-3) of the Mississippi Supreme Court deprive MPC of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States?"

Plant Daniel consists of two 500 megawatt units. By order, MPSC issued to MPC a certificate of public convenience and necessity authorizing the construction of Unit 1 and later issued a similar certificate before construction for Unit 2. Before Unit 1 was completed and during the construction of Unit 2, MPC realized because of financial problems it could not alone finance the completion of the construction of both units. Upon petition to MPSC, MPC requested approval of a contract to sell one-half of both units to Gulf Power Company agreeing to finance the balance of construction of Unit 2 and with also the agreement that the two companies would settle accounts when the two units were completed whereby each company would own a one-half undivided interest in both units. MPSC expressly approved this contract by order. As a part of this present rate case, MPC estimated it would owe to Gulf as a result of the contractual agreement approximately \$40,000,000 representing the cost difference between Units 1 and 2 and certain coal cars which were required for transporting coal for Unit 2.

In this proceeding before MPSC for an increase in retail rates, despite its express approval earlier of the contract between Petitioner and Gulf Power Company, MPSC reduced the rate base of MPC by \$20,000,000.

PARTIES TO THE PROCEEDING BELOW

MPC is a Mississippi corporation engaged in the generation, transmission, distribution and sale of electricity at wholesale and retail in 23 counties in the southeastern portion of the State of Mississippi.* MPSC is an agency of the State of Mississippi, consisting of three elected commissioners, charged by Mississippi law with the regulation of retail rates, properties and services of public utilities in Mississippi (MPC is a public utility under Mississippi law). The Mississippi Coalition of Legal Services is an agency created by law, funded by the federal government, charged with the duty of providing legal services to the indigent.

* MPC is a wholly-owned subsidiary of The Southern Company, a registered utility holding company under the Public Utility Holding Company Act of 1935, 15 USC Sec. 79. Other wholly-owned subsidiaries of The Southern Company are Georgia Power Company, Alabama Power Company, Gulf Power Company, Southern Company Services, Inc. and Southern Electric International, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVI- SIONS INVOLVED	2
STATEMENT OF THE CASE	3
TIMELINESS OF RAISING CONSTITUTIONAL ISSUE	5
ARGUMENT	6
I. THE QUESTION HERE PRESENTED IS OF GREAT PUBLIC IMPORTANCE	6
II. MPC HAS BEEN DEPRIVED OF ITS PROP- ERTY WITHOUT DUE PROCESS OF LAW....	7
CONCLUSION	13

TABLE OF CITATIONS

CASES	Page
<i>Bluefield Water Works Co. v. Public Service Comm. of West Va.</i> , 262 U.S. 679, 67 L. ed. 1176 (1922) ..	7, 8
<i>Chicago Milwaukee & St. Paul Railway Co. v. Public Utilities Comm.</i> , 274 U.S. 344, 71 L. ed. 1085, 1090 (1927)	7, 10
<i>Federal Power Comm. v. Hope Natural Gas Co.</i> , 320 U.S. 519, 88 L. ed. 333 (1944)	7-8, 10
<i>Laclede Gas Light Co. v. Public Utilities Comm. of Missouri</i> , 8 F. Supp. 806, 6 PUR (NS) 72, (3 Judge District Court, MO.) (1934)	8, 10
<i>Northern P.R. Co. v. Dept. of Public Works</i> , 268 U.S. 39-44, 69 L. ed. 837-84 (1925)	8, 9
<i>Ohio Bell Telephone Co. v. Public Utilities Comm.</i> , 301 U.S. 292, 81 L. ed. 1093 (1937)	8, 11
FEDERAL STATUTES	
Public Utility Holding Company Act of 1935, 15 U.S.C. § 79	ii
MISSISSIPPI STATUTES	
Miss. Code of 1972 § 77-3-11	4
Miss. Code of 1972 § 77-3-33	2, 3
MISCELLANEOUS	
Constitution of the United States, 14th Amendment	i, 2, 3, 5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

No. _____

MISSISSIPPI POWER COMPANY,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
INTERNATIONAL PAPER COMPANY,
THE UNITED STATES OF AMERICA,
Respondents.

**PETITION OF MISSISSIPPI POWER COMPANY
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI**

Petitioner Mississippi Power Company (MPC) respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi rendered March 23, 1983, affirming an order of the Mississippi Public Service Commission (MPSC) dated April 16, 1981.

OPINIONS BELOW

The order of MPSC here involved was rendered on April 16, 1981 and is annexed hereto as Appendix A. The opinion and orders of the Chancery Court of Hinds County, Mississippi, First Judicial District, dated March 19, 1982 and March 30, 1982, respectively, are jointly annexed as Appendix B. The opinions of the Supreme Court of Mississippi rendered March 24, 1983 are attached hereto as Appendix C.* The order of the Supreme Court of Mississippi, rendered April 27, 1983 denying petition of MPC for rehearing is attached hereto as Appendix D. The order of MPSC, dated June 5, 1973, granting to MPC a certificate of public convenience and necessity for construction and operation of Unit 2, Plant Daniel, is attached hereto as Appendix E. The Order of MPSC, dated August 27, 1976, approving sale by MPC to Gulf Power Company of a one-half undivided interest to Units 1 and 2, Plant Daniel, is attached hereto as Appendix F.

JURISDICTION

The opinion and judgment of the Supreme Court of Mississippi is dated and was rendered on March 24, 1983. Petitioner timely filed a petition for rehearing, which was denied by said court on April 27, 1983. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 USC 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves consideration of Sec. 77-3-33, Mississippi Code of 1972, and the 14th Amendment to the Constitution of the United States. The complete texts

* Only Part I of the majority opinion is included in Appendix C because Petitioner asserts no claim with respect to Part II thereof.

of Section 77-3-33, Mississippi Code of 1972 and of Amendment 14 to the Constitution of the United States are attached hereto as Appendices G and H.

STATEMENT OF THE CASE

On October 20, 1980, MPC filed with MPSC a notice of increase in retail rates for electric service. On April 16, 1981 MPSC issued its order granting to MPC an increase in rates in an amount of approximately 28% of the increase requested. As part of its basis for denying more complete rate relief, MPSC reduced the rate base of MPC by \$20,000,000 representing a portion of payments to be made by MPC to Gulf as a part of the cost of Unit 2, Plant Daniel, and part of the cost of coal rail cars for transportation of fuel to the plant.

A short history of Plant Daniel, as reflected by the record, follows:

In October of 1970, a decision was made to build Unit 1 of Plant Daniel in Jackson County, Mississippi. This decision was based upon studies then indicating that MPC's load requirements were going to be growing to the extent that by 1976 the utility would have a production deficiency of approximately 500 megawatts. These figures and the original plans for Plant Daniel were submitted to MPSC, approved, and a certificate of public convenience and necessity issued.

In 1973, based upon projections showing a further increase in the demand for electricity, plans for a second unit at Plant Daniel were announced. Once again the plans were submitted to MPSC and a certificate of public convenience and necessity was issued by MPSC to MPC for construction of Unit 2. Early in 1974 an updated construction budget showed that Unit 2 would cost more than Unit 1 because of the time difference and the impact of inflation on costs.

In 1974 MPC postponed the completion date of Unit 1 from 1976 until 1977 (and Unit 2 from 1978 until 1979), as a result of difficulties MPC was encountering in obtaining financing. This was caused by declining earnings which resulted from the inability to sell a sufficient amount of long-term securities in order to finance this construction.

When construction was resumed on Unit 1, MPC announced that it was entering into negotiations with Gulf Power Company (Gulf) on a plan for joint ownership of the entire Plant Daniel facility. Under terms of the agreement which was finally reached between MPC and Gulf, Gulf was to take over the financial obligation to complete Unit 2 which was then in very early stages of construction. Likewise, Gulf was to pay MPC one-half of the amounts already spent by MPC in the construction of certain common facilities to be utilized by both units of the Plant Daniel facility. Upon completion of both units, MPC and Gulf were to "adjust their accounts" so as to reflect that each company owned a one-half undivided interest in the entire Plant Daniel facility (as opposed to each company owning an individual unit and sharing the common facilities). Pursuant to Mississippi Code Annotated § 77-3-11 (1972), this plan was presented to MPSC along with the results of studies showing a marked decrease in the projected growth rate of electricity demand, and the entire agreement was expressly approved by MPSC. As a part of this agreement, the completion date for Unit 2 was further postponed from 1979 to 1980. After MPC and Gulf entered into the above described agreement, Gulf deferred this completion date one additional year until 1981.

As a result of the time delays and other various cost overruns, the final cost of Unit 2 exceeded the final cost of Unit 1. Therefore, part of the "adjusting of accounts" between MPC and Gulf necessitated the estimated payment of approximately \$40,000,000 in order for the ac-

counts to reflect an undivided one-half ownership in the entire Plant Daniel by each company. MPC's decision to sell a one-half interest to Gulf as approved by the MPSC saved MPC and its customers \$55,000,000 over the alternative of canceling Unit 2—the only other alternative available in 1976 when the decision was made, and MPSC's approval of the Gulf transaction was issued.

MPSC appealed from the order of the Chancery Court to the Supreme Court of Mississippi, and, as stated before, the Supreme Court of Mississippi reversed the Chancery Court and upheld the action of MPSC in this regard. Only Part I of the opinion of the Supreme Court of Mississippi is in issue before this Court.

TIMELINESS OF RAISING CONSTITUTIONAL ISSUE

In its assignment of errors to the Hinds County Chancery Court, the intermediate appellate court for orders of MPSC under Mississippi Law, MPC asserted that the order of MPSC deprived MPC of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States. A copy of such assignment of errors is attached hereto as Appendix I. The Chancery Court upheld MPC's contention.

In its Petition for Rehearing in the Supreme Court of Mississippi, MPC again assigned the action of MPSC in reducing its rate base because of Plant Daniel as a deprivation of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States. The relevant portion of its Petition for Rehearing is attached hereto as Appendix J. As indicated in Appendix D, the Supreme Court denied rehearing.

It was not necessary initially to raise the constitutional question in the appeal by MPSC to the Supreme Court, since the Chancery Court had granted MPC its requested relief on this issue.

ARGUMENT

I. THE QUESTION HERE PRESENTED IS OF GREAT PUBLIC IMPORTANCE.

Currently there is a growing practice among state utility regulatory authorities, under the banner of increasing emphasis on "consumerism", to deny to utilities the opportunity to maintain financial integrity necessary to discharge their public responsibilities of providing reliable public utility service. State regulatory authorities have so restricted the abilities of utilities to achieve a fair return that most utility stocks presently have a market value well below book value—a condition which results in an erosion of the value of stock held by existing stockholders whenever a necessary new issue of stock is sold at a price below book value. Securities of electric utilities have been widely down-graded by rating agencies—resulting in a higher cost of capital.

For utilities to be denied the right to earn a return on the reasonable value, indeed, the original cost of facilities admittedly devoted to and used in the public service, as MPC has been so denied here, the result will be even a further deterioration of its financial health. The investment community will not look with favor upon investing a utility whose State Commission may arbitrarily reduce rate base because of a transaction which such State Commission has, itself, previously approved. It is important that this Court now make a pronouncement that such state regulatory agency decisions will not be tolerated.

Unless financial health of MPC and all other investor-owned electric utilities is maintained, they will not be able to finance on reasonable terms necessary property additions to their systems which will permit them to meet the growing public demands for increased electric service. Adequate and reliable electric service cannot be assured the consuming public if the utilities cannot, for financial reasons, expand their generating, transmission

and distribution facilities to the extent required to meet increasing demand. Included in MPC's customers are substantial installations of the armed services, the National Aeronautics and Space Administration and a large builder of ships for the Navy.

II. MPC HAS BEEN DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Payment by MPC to Gulf of the estimated \$40,000,000 necessary to equalize the investment of MPC and Gulf each in Plant Daniel was strictly in conformity to the agreement which had been approved in 1976 by MPSC. Such approval was unconditional—no dollar ceiling was imposed. No evidence was presented by any mismanagement by MPC, nor was there any evidence showing, or contention made, of the invalidity of the 1976 order of approval by MPSC.

No contention was made that the order granting the certificate to construct Unit 2 was invalid, or that the facilities thereby authorized were not used and useful in rendering electric service. MPC was entitled to rely upon the certificate for Unit 2 and upon the MPSC order approving the agreement with Gulf, including payment by MPC to Gulf of the money necessary to equalize the investment of each in Plant Daniel. Evidence in the record that cancellation of Unit 2, instead of the sale to Gulf, would have cost MPC and its customers an additional \$55,000,000 was uncontradicted. Arbitrarily to fix rates based upon a denial of the right to earn a return on \$20,000,000 of its property used and useful in rendering electric service amounts to confiscation of its property and a deprivation of its property without due process of law. *Bluefield Water Works Co. v. Public Service Comm. of West Va.*, 262 U.S. 679, 67 L. ed. 1176 (1922); *Chicago Milwaukee & St. Paul Railway Co. v. Public Utilities Comm.*, 274 U.S. 344, 71 L. ed. 1085, 1090 (1927); *Federal Power Comm. v. Hope Natural Gas Co.*,

320 U.S. 519, 88 L. ed. 333 (1944); *Laclede Gas Light Co. v. Public Utilities Comm. of Missouri*, 8 F. Supp. 806, 6 PUR (NS) 72, (3 Judge District Court, MO.) (1934); and *Northern P.R. Co. v. Dept. of Public Works*, 268 U.S. 39-44, 69 L. ed. 837-84 (1925); *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292, 81 L. ed. 1093 (1937).

In *Bluefield v. Public Service Comm.*, supra, the court said:

The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service, are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . .

And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. *Willcox v. Consolidated Gas Co.* (1909) 212 U.S. 19, 41, 52, 53 L. ed. 382, 395, 399, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases* (*Simpson v. Shepard*) (1913) 230

U.S. 352, 434, 57 L. ed. 1511, 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

...

The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.

Deliberate underevaluation of property comprising a rate base without evidentiary support for such underevaluation is a denial of due process.

In *Northern Pacific R. Co. v. Dept. of Public Works*, supra, this Court said:

But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence (*Chicago Junction Case*) (*Baltimore & O.R. Co. v. United States*) 264 U.S.

258, 263, 68 L. ed. 667, 673, 44 Sup. Ct. Rep. 317, or upon a finding made upon evidence which clearly does not support it (*Interstate Commerce Commission v. Union P.R. Co.*, 222 U.S. 541, 547, 56 L. Ed. 308, 311, 32 Sup. Ct. Rep. 108), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process.

This court re-affirmed this principle in *Chicago M. & St. Paul Railway Co. v. Public Utilities Comm.*, supra, when it said: "[W]here rates found by a regulatory body to be compensatory are attacked as being confiscatory, the courts may inquire into the method by which its conclusion was reached."

In *Laclede Gas Light Co. v. Public Utilities Comm. of Missouri*, supra (a three judge district court) it was stated:

Upon the facts as we now have them (the hearing on the merits may give us entirely different facts), the Commission under-valued plaintiff's used and useful property. It is difficult, moreover, to escape the conclusion that this underevaluation was reached arbitrarily and by methods which cannot be approved. . . . To value property for rate making without evidence is a denial of due process. . . . A valuation reached by incorrect methods cannot be sustained.

In *Federal Power Commission v. Hope Natural Gas Co.*, supra, the court stated:

[T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & G. T. R. Co. v. Wellman*, 143 U.S. 339, 345, 346, 36 L. ed. 176, 179, 180, 12 S. St. 400. By that standard the return to the equity owner should be

commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission*, 262 U.S. 276, 291, 67 L. ed. 981, 986, 43 S. Ct. 544, 31 ALR 807 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at.

Although the court freed State Commissions from having to use reproduction costs new or any other theory in determining value of rate base, it still recognizes that a utility may not be constitutionally deprived of the opportunity to earn a fair return on the reasonable value of all property used and useful in rendering public service.

In *Ohio Bell Telephone Co. v. Public Utilities Comm.*, supra, the state commission ordered the Company to refund rates collected by it in excess of what the Commission determined to be reasonable rates for past periods upon the basis of the commission's modifying the value, established by evidence, of the telephone company's property as of the dates for which refund was ordered. The Commission, and the Ohio Supreme Court undertook to justify the action by taking what it called judicial notice of price trends in such time periods without giving the telephone company an opportunity to rebut them. The property values for the past time periods had been established in earlier proceedings for each local telephone exchange, but subsequently the proceeding was expanded to embrace the entire state of Ohio, pursuant to a new statute authorizing a state-wide scope of proceeding for determination of future rates based on a valuation as of a certain date subsequent to the dates

as of which previous valuations of local exchanges had been made. When the Commission valued the property as of the newly determined date, it also undertook to reduce the valuations for previous years of the local exchanges. This court held such action to be unconstitutional both because of deprivation of property and lack of notice and hearing, in contravention of the 14th Amendment. This court said: "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." The court went further to state:

The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

In the case for which certiorari is sought in this proceeding, the MPSC, arbitrarily and without evidentiary support, undertook to reduce the value of property in which MPC had invested its funds in reliance upon a

certificate from MPSC authorizing the construction and in reliance upon an order of MPSC itself approving the sale of an interest therein to Gulf. No witness had recommended such action, and no issue on this point was made by the MPSC Staff at the hearing. The first notice to MPC of its intended action was the issuance by MPSC of its order reducing rate base. There is no denial of the fact that the property, all of it, was used and useful in rendering electric service. MPC's action means that \$20,000,000 of MPC's investment in Plant Daniel is lost forever from its rate base. Such action is confiscatory and deprives MPC of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to the Supreme Court of Mississippi.

Respectfully submitted,

JAMES S. EATON
EATON, COTTRELL, GALLOWAY
& LANG
2300 14th Street
P. O. Drawer H
Gulfport, MS 39501
(601) 864-2682

Attorney for
Mississippi Power Company

APPENDICES

1a

APPENDIX A
MISSISSIPPI
PUBLIC SERVICE COMMISSION
JACKSON

April 16, 1981

U-3929

MISSISSIPPI POWER COMPANY

IN RE: NOTICE OF MISSISSIPPI POWER COMPANY OF ITS
INTENTION TO CHANGE RATES FOR THE RENDI-
TION OF ELECTRIC SERVICE THROUGHOUT ITS
SERVICE AREA IN MISSISSIPPI; TO BECOME EFFEC-
TIVE ON NOVEMBER 20, 1980

ORDER

This cause coming on this date to be heard by the Mississippi Public Service Commission, hereinafter referred to as the "Commission," for final determination of all the issues presented in this cause pursuant to Notice of Intention to Change Rates filed herein by Mississippi Power Company hereinafter referred to as the "Company," on October 10, 1980, and the Commission after due hearing and having considered all oral and documentary evidence entered in this proceeding, does find and order as follows:

Pursuant to Section 4, and other applicable sections of the Public Utilities Act of 1956, Chapter 372, Mississippi Laws of 1956, (the "Act") (Section 77-3-5, Mississippi Code of 1972) the Commission has full jurisdiction of the Company and the subject matter of this proceeding.

On October 20, 1980, pursuant to the provisions of Section 10 of the Act (Section 77-3-37, Mississippi Code of 1972) the Company filed with the Commission its Notice of Intention to Change Rates. This Notice was filed less than a year after the Commission's earlier decision in March 1980, approving substantial rate increases. It thus

2a

constitutes an extraordinarily rapid rate of price increase which is of great concern to the Commission. The Notice provided that the change in rates would be effective for service rendered on or after the 20th day of November, 1980. On October 24, 1980, the Commission entered its order suspending the effective date of the change in rates for a period of not less than ninety (90) days from and after November 14, 1980, and ordered that a full investigation of the lawfulness of the proposed rates be made by the staff of the Commission and that this cause be made the subject of a public hearing. Thereafter, by order dated January 13, 1981, the Commission further suspended the operation of the proposed new rates for a period not to exceed six months from and after October 20, 1980.

On November 10, 1980, the Company, as authorized by Section 10 of the Act (Section 77-3-39, Mississippi Code of 1972) filed with the Commission a refunding bond in the amount of Twenty Million and no/100 Dollars (\$20,000,000), and placed said proposed new schedules of rates and charges into effect on service rendered on and after November 20, 1980. The Commission by order dated November 17, 1980, approved said refunding bond and directed the Executive Secretary to accept and receive said bond.

Pursuant to appropriate orders the Commission engaged the services of special counsel and public utility consultants to assist the Commission and its staff in its consideration of this case. The consultants (hereinafter referred to as the "staff" when not referred to by name) in conjunction with the regular staff of the Commission conducted a thorough and complete investigation of the proposed new schedules of rates and charges and two staff witnesses presented evidence during the hearings in the case.

Pursuant to appropriate orders entered by the Commission and due notice having been given as provided by

the Act and the Rules of Practice and Procedure of the Commission, public hearings were commenced on January 8, 1981, and after lawful continuances from time to time, the public hearings were concluded on April 14, 1981. By direction of the Commission, the staff gave appropriate advance publicity as to each scheduled hearing to the general public advising that all interested persons and public witnesses would be heard. During each hearing the Chairman of the Commission invited members of the general public to make statements or introduce evidence.

The following persons intervened in this cause, participated in the proceeding, and presented evidence and testimony at the hearings: Obie Davis, et al, South Mississippi Legal Services; Mississippi Gulf Coast Building Trades Council; and Mississippi LP-Gas Dealers Association. Certain other members of the public presented testimony at the public hearings. All interested persons and parties were afforded an opportunity to present statements and evidence. All parties were afforded a reasonable opportunity for cross-examination.

During the hearings in this cause extensive and comprehensive evidence was presented on behalf of the Company, the staff, intervenors and public witnesses consisting of testimony and numerous exhibits. The Commission received and considered evidence pertaining to accounting practices; rate schedules; the corporate structure of the Company and its relationship with The Southern Company, a holding company, and other operating and affiliated companies of The Southern Company System; fuel costs and supplies, capital structure, cost of capital, working capital requirements, and the components thereof, rate of return, past, present, and projected financial conditions of the Company, revenues, operating and maintenance expenses, interest and dividend coverages, tax normalization, construction work in progress, depreciation and income tax reserves, interperiod tax allocation, and all other matters relevant to a deter-

mination of this Cause. The Company presented testimony and evidence from six Company witnesses and three public utility consultants. At the request of the Commission, its staff and the staff witnesses, the Company furnished certain data, information and documents dealing with various aspects of the Company's operations, financial condition, earnings, and notice of change in rates.

In addition to the above mentioned evidence, this Commission heard meaningful testimony from public witnesses, and the impact of any increase in the cost of electric service on consumers was given serious consideration by this Commission.

After giving consideration to all evidence presented in this Cause, the Commission finds that it has received and considered substantial evidence which is material and relevant to a determination of the lawfulness and reasonableness of the rates and charges filed by the Company on October 20, 1980, and that said evidence amply supports the findings, conclusions, opinion and order as set forth herein. This is consistent with prior decisions of the Mississippi Supreme Court and the Act that this Commission's orders must be supported by substantial evidence and sufficient findings of fact. Further, in determining the various issues presented in this cause, the Commission has adhered to principles of ratemaking that have been applied in prior decisions of this Commission and approved in prior decisions of the Mississippi Supreme Court.

A. *Findings of Fact*

I. THE COMPANY

Mississippi Power Company, hereinafter referred to as the Company, is a corporate public utility as defined in the Public Utility Act of 1956 as amended. It is incorporated under the laws of the State of Mississippi. All of the common stock of the Company is owned by The

Southern Company, an investor-owned public utility company, organized and existing by and through the laws of the State of Delaware. The Southern Company also owns the common stock of Georgia Power Company, Alabama Power Company, and Gulf Power Company.

The Company is engaged in the generation, transmission, distribution and sale of electric energy to the public in 23 counties in southeast Mississippi. The Company serves 52 municipalities and 70 non-incorporated communities. In 1980, the Company had an average of 156,807 retail customers. It serves at wholesale all of the requirements, above that supplied by Southeastern Power Administration, of one REA distributing cooperative and part of the requirements of two other such rural electric cooperatives. Rates charged by the Company for sales to these cooperatives are not subject to the Commission's determinations in this proceeding.

The four operating companies of The Southern Company System are interconnected by a transmission grid and the generating facilities of the operating companies are operated as a fully integrated power system. The Company contends that this has many advantages.

Although this integrated system of ownership and operation of generating facilities is not a direct issue in this case, it is a matter of continuing and growing importance to this Commission as it bears directly on the Company's rate base and capital costs which must be supported by Mississippi customers. In this connection, the Commission takes note of the fact that the Jackson County Steam Plant unit No. 2 (hereinafter referred to as Plant Daniel Unit no. 2) is scheduled for commercial production in 1981 and that its addition to the System contributes significantly to the Company's rate interest request in this case.

Pursuant to the Commission's Order of August 27, 1976 in Docket U-3168, the Company sold a one-half un-

divided interest as tenant in common in its Plant Daniel to Gulf Power, an affiliated member of The Southern Company System. This transaction was proposed due to the Company's earlier overestimate of its own generation capacity requirements and Gulf's apparent need for more capacity at a time when Plant Daniel was under construction. The Commission approved the proposed sale based on the Company's representation that it would be in the best economic interest of both the Company and its customers and that it would thus serve the public interest.

The Commission's Order in Docket U-3168 stated that after Plant Daniel unit no. 2 was completed, necessary adjustments would be made so that each party would have a 50% ownership interest in both units and the common facilities, but appropriate rate treatment with respect to the sale was not specified at that time.

In this case the Company's proposed ratemaking treatment with respect to the completion of Plant Daniel unit no. 2 reflects an exchange of ownership between the Company and Gulf Power pursuant to the Commission's approval in 1976 under which the Company will relinquish a half interest in Plant Daniel unit no. 1 for a half interest in unit no. 2. Since unit no. 1 was completed about four years earlier than unit no. 2, unit no. 2 is more costly and the exchange results in a substantial increase in the Company's proposed rate base without any addition of capacity.

While the Company projected in 1977 that the cost of this exchange with Gulf Power would ultimately amount to \$16 million, the amount actually proposed as a gross plant addition in this case is \$38 million. The staff witnesses who addressed this matter recommended that the cost-overrun should be considered in arriving at the allowed rate of return in this case. In addition, the staff witnesses recommended that the Plant Daniel unit no. 2 coal stocks should be excluded from the Company's rate

base in this case, and that increased rail car costs should also be excluded. On May 13, 1977 in an Order in Docket U-3245, this Commission permitted the Company to purchase 230 coal cars at a cost of \$35,000 each to serve Plant Daniel. The Company's proposed rate treatment here is to, in effect, exchange half of those cars with Gulf for corresponding cars costing \$44,900 each, thus producing a rate base addition of \$1,138,500. The Company's rate base shall be reduced accordingly.

This Commission must, at this time, give careful consideration to this subject and its effect on the overall cost of energy to the Company's customers.

Further, the Commission takes notice of the evidence introduced by the Company regarding its generation plant investment and operating costs. For many years now the Commission has continuously monitored revenue and audited the Company's fuel costs for generation of electricity. Monthly, quarterly, and annual reports are received from the Company and independent auditors employed by the Commission. The growing concern over rising generation costs require that this Commission carefully study, investigate and give careful consideration in appropriate hearings to all plans and efforts by the Company which contribute to these costs so that the Commission is able to assure that the resulting effect will be the lowest, ultimate cost of electric energy to Mississippi customers, both now and in the future. In this regard, the Commission takes note of the fact that the Company's last rate increase was effective October 10, 1979, pursuant to this Commission's Order of March 7, 1980 in Docket No. U-3739 and was projected to yield increased revenues of \$16,805,000 annually. The filing of this case within a matter of months after that Order seeking an additional \$39.3 million in annual rate increases is virtually unprecedented in this jurisdiction and serves to clearly illustrate the urgent need for particularly careful regulatory scrutiny of the Company's alleged revenue deficiency in this case.

The result of this Order, as hereinafter set out, is to find and order that the proposed new schedule of rates and charges filed by the Company on October 20, 1980, are unjust, unreasonable, and unlawful and shall not be allowed or approved. The proposed new rates result in an increase in revenues to the Company which is excessive and further result in an unfair and unjust burden on the Company's customers. Consistent with this result, however, the Commission is compelled to acknowledge certain current economic realities which must be considered in reaching a decision in this cause which will be supported by substantial evidence.

To ignore the evidence regarding the impact of inflation and general economic conditions on the Company's cost of providing electric service to its customers would constitute an error of law and disregard for the express terms of the Act. However much this Commission may be aware of the burden and hardship placed on the public by any increase in the cost of electric service, it cannot avoid the responsibilities placed on it by the Act and render decisions which will be upheld as consistent therewith. To do otherwise could result in consequences having greater adverse effects on the public.

The Company failed to meet the burden of proof necessary to justify the increase in revenues produced by the proposed new schedule of rates and charges; however, there remains sufficient evidence, which a court would recognize, to support the additional revenues which the Company is allowed an opportunity to earn as a result of this Order.

II. RATE BASE

The Company filed a Notice of Change in Rates, which contains financial and operational analyses based on a jurisdictional allocation which reflects the Company's retail operations. This allocation is based on testimony and exhibits giving a detailed and comprehensive analysis of the procedure in developing this allocation. This testimony

and the exhibits were reviewed and studied by the staff. For purposes of this case, the Commission is accepting the jurisdictional allocation which reflects the Company's retail operations as shown in the evidence, although the Commission does not necessarily accept the results, for other reasons, which are produced by the allocation.

The Company proposed an average rate base of \$554,221,000, which is based on a projected test year for twelve months ending November 30, 1981. This rate base reflects in principle the net investment or depreciated original cost which is consistent with prior decisions of this Commission and the Mississippi Supreme Court as representing the reasonable value of a utility company's property and is the appropriate concept to follow in this case. However, the aforesaid rate base of \$554,221,000 includes certain inappropriate components and fails to exclude other components as recommended by the staff.

The Commission finds that its staff's recommendations with regard to certain components which were erroneously included by the Company in its proposed rate base and others improperly not excluded therefrom, together with other adjustments, as hereinafter set out, are reasonable, proper, and supported by substantial evidence. Therefore, the Commission finds that the Company's proposed rate base as aforesaid is excessive, overstated, and is not a basis for fair and just rates to the Company's customers.

The Company proposes a projected test year for rate base and revenue operating results for the projected test year ending November 30, 1981. The Commission realizes the difficulty in evaluating the evidence relied upon in the development of a projected test year since, in some instances, it is based on forecasts which do not provide the same level of documentation and potential for review as is available in an historical test year. However, the use of a projected test year is consistent with the principles previously recognized by this Commission and the Mississippi Supreme Court. We shall continue to evaluate

the appropriateness of utilizing a projected test year in each case. However, current inflationary pressures, the fact that rates are made for the future, and the need to assure that future service requirements are met by the Company, require that in this instance the projected test year be utilized as the basis for determining just and reasonable rates.

The Commission staff has proposed several adjustments to the Company's proposed rate base as follows:

Customer Contributed Capital

The staff proposed that the Company's rate base be reduced by the average balance of Account 261 (Property Insurance Reserve), Account 262 (Injuries and Damages Reserve), and Account 252 (Customer Advances for Construction). As was shown by the staff's witness, Mr. Clark, these operating reserves and customer advances are customer contributed capital that the Company has use of until such time as the reserve accounts must be debited for a loss or the advances are refunded. Mr. Clark's testimony shows that the Company fails to deduct or exclude these amounts from its rate base. This is wrong since it represents funds paid in by the Company's customers and the Company should not earn on it.

Construction Work in Progress

The Company has included \$18,354,000 of construction work in progress (CWIP) in rate base and a \$1,384,000 allowance for funds used during construction (AFUDC) credit to income for the projected test year. The AFUDC credit was related only to the "revenue-producing" CWIP of \$9,550,000 included in the Company's proposed rate base. The staff recommends that all CWIP be excluded from the rate base and that the AFUDC credit be eliminated from operating income. The Commission agrees with the staff. The primary reason CWIP should not be included in the Company's rate base is that such invest-

ment is not used and useful in the rendition of electric service to the ratepayers. Especially where, as here, a projected test period is used, it is inappropriate to further reach beyond the end of a projected test year to include CWIP in the rate base. As the Commission stated in its previous Order of March 7, 1980, in the Company's last rate case (Docket No. U-3739) :

"... there are two tests the Commission has to meet in the determination of rate base. These tests are (i) the 'special facts' test as determined by the Mississippi Supreme Court and (ii) the test of whether or not an item is 'generally considered in determining the rate base' as laid down by statute in Mississippi." (Mimeo, page 12)

The Company's claim for inclusion of CWIP in this case was based on cash flow arguments. The Commission finds that this does not constitute a "special fact", nor is the inclusion of CWIP in the rate base a general practice in this jurisdiction.

Pre-1971 I.T.C.

The Company avails itself of the investment tax credits as prescribed by statute and the Internal Revenue Code. The accumulated deferred investment tax credits represent cost free capital that has been contributed by the Company's ratepayers. As determined above, the Company's rate base should not generally include ratepayer contributed capital. However, as the Company's witness, Mr. Blakeslee, pointed out, the Revenue Act of 1971 prohibits rate base reduction by the unamortized balance of accumulated deferred investment tax credits under the accounting methods chosen by the Company. That notwithstanding, there is no such prohibition with respect to the unamortized balance of pre-1971 accumulated deferred investment tax credits relating to the Revenue Act of 1962. Because the accumulated balance of the pre-1971 ITC does represent cost-free, customer-contributed capi-

tal, the Company's ratepayers should receive the deserved benefit of a rate base deduction equal to the average balance of the pre-1971 accumulated deferred investment tax credits.

Average Net Plant

In Docket No. 3739 the Commission accepted the use of beginning and end of test year average method of quantifying net plant. The Company has used such an approach in its filing in this case and the staff does not dispute the application of such an averaging concept. However, whereas the Company's proposed rate base is based on the average of projected beginning and end of year figures, the staff is persuasive in explaining why that approach is less accurate than the alternative available here of using an actual beginning year figure. This allows for the rate base inclusion of all the reasonable projected plant additions up to November 1981, which will be in service prior to the close of the test year.

Fuel Stock Balances

The Company has projected average test year fossil fuel stock balances of \$69,187,000. The Staff has recommended a reduced level of the coal stock balances and has proposed an average test year fossil fuel stock balance of \$40,278,000.

The Staff based its projected coal stock balances on a ninety-day burn requirement and increased coal costs as projected by the Company. The Company's major objection to the staff's adjustment appears to rest on the contention that the allowed fuel stock should exceed the ninety-day burn level.

As detailed in the testimony that was presented in this proceeding by staff witness Clark, the Company has made three errors in projecting fuel stock balances for rate base inclusion in the test year. First, the underlying Company policy of providing for a level of coal stocks on

hand based on nameplate plant ratings is not an appropriate basis on which to determine the rate base. Second, the Company's projected coal stocks include an abnormal build up of the fuel stocks in anticipation of a work stoppage by the United Mine Workers. Third, the Company's projected coal stocks include an abnormal build up of coal for Plant Daniel due to construction delays at Plant Daniel unit no. 2.

According to the Company, its policy for the level of coal stocks is "... to generally maintain a sixty (60) day supply of coal based on each coal burning unit operating at its nameplate rating." This 60-day supply of coal based on nameplate rating operation equates to a 90- to 100-day supply based on actual operation of the units. Clearly, then, it is not appropriate to base a coal stock allowance in rate base on nameplate ratings. As staff witness Clark testified, the implication that generating units will operate at nameplate capacity for 1,440 straight hours (60 days) is not within the realm of reasonableness. Moreover, it is not appropriate to include additional coal supplies in the rate base in anticipation of a prolonged coal miners strike because such an occurrence is not a recurring annual event which normal rates should reflect unless ever-continuing annual coal strikes are reliably anticipated.

Likewise, the Plant Daniel coal build-up would be an improper rate base inclusion. When Plant Daniel unit no. 2 goes into commercial operation, the Company will be a one-half owner of unit No. 1 and unit No. 2, as opposed to the present situation in which the Company owns all of unit No. 1. However, the Company's generation capacity will not increase. Instead, Gulf Power Company will own and have access to the second increment of 500 MW at Plant Daniel, and it is Gulf that should be responsible for the added coal stock.

The Commission's Order in the Company's last retail rate case, Docket No. U-3739, allowed an average fuel stock balance of \$30,764,321, based on ninety days of

projected burn and the Company's projected average prices. In this proceeding we will follow the staff's recommendation and provide for a fuel stock balance of \$40,278,000 representing an increase of approximately \$9,514,000, or 31 percent, rather than the Company's proposed increase of more than 100 percent to nearly \$70 million. This allowance is ample to cover the effects of inflation and it is especially valid given that no additional coal fired generation will go on line in the projected test year in this case. The increase of \$9,514,000 allows for increased tonnage to the extent needed to meet projected burn requirements as well as the Company's projected increased average prices.

Excess Deferred Income Taxes

This proposed adjustment comes about because of the reduction in the corporate Federal income tax rate from 48% to 46% effective January 1, 1979. This Commission agrees with staff witness, Dr. Wilson, on this issue. For ratemaking purposes, the excess accumulated deferred income taxes should be flowed back to the ratepayers in a period not to exceed two years. This position is consistent with other jurisdictions and, contrary to the Company's claims, has not caused any utility to lose the right to take advantage of accelerated depreciation.

The Commission staff proposes an adjustment to the Company's adjusted total electric utility rate base to reflect the amortization of excess accumulated deferred income taxes. The accumulated deferred income tax account is excessive, as it contains a surplus of dollars that were collected at the old corporate income tax rate of 48 percent, and which are unnecessary to meet tax obligations at the current 46 percent tax rate. \$1,984,000 was identified as the amount accumulated in excess of the current 46 percent tax rate. The Commission accepts staff witness Wilson's proposal to amortize this amount over a two-year period. The two-year period will allow the overcollected revenues to be returned to ratepayers

as soon as possible, thereby minimizing the difference between those ratepayers who actually provided the dollars and those who will receive the benefit of rates which reflect the adjustment.

The adjustment, accepted by the Commission, represents one-half of the amount of excess accumulated deferred taxes to be amortized each year for a period of two years. This adjustment is consistent with the methodology sponsored by Mr. Clark. If the amortization of excess accumulated deferred taxes had begun in the test year, average accumulated deferred taxes deducted from rate base would be reduced by one-half the annual amortization, thus increasing rate base.

Cash Working Capital

Investors are entitled to earn a return not only on the fixed plant and property of the utility, but also on reasonable working capital which is investor-supplied funds needed by the utility to meet its day-to-day operating expenses. A utility must pay for certain expenses in its operations prior to recovering the full amount necessary to pay that expense in revenues from its customers. The amount of cash working capital needed for such expenses is determined by conducting a lead/lag study which computes the time intervals between: (1) the time that service is provided by the company and the time the company receives payment for that service and, (2) the period for which various expenses are incurred by the company and the date that those expenses must be paid. These two intervals, the former of which is the payment lag and the latter of which is the expense lag are combined to reach a net interval. This interval is then multiplied by the company's average daily expenses to determine the necessary working capital.

The Company has calculated the cash working capital requirement of \$25,714,000 using a formula approach commonly referred to as the 45-day formula. The staff has recommended a cash working capital allowance

wherein the lags in the payment of expenses are compared with the lags in the receipt of revenue.

Based upon the record before it, the Commission finds that the 45-day formula is not an appropriate method for determining the Company's cash working capital requirement. The Commission further finds that the staff's proposed lead/lag approach will produce a just and reasonable result for this Company in this case. Not all operation and maintenance expenses are paid on the date service is rendered to the customers. Also, it is incorrect to assume that the Company's customers pay their bills 45 days after the date service is rendered. As the record in this case establishes, while the Company acknowledges that it has done no proper working capital studies, it estimates that there are 30 days in each billing cycle; there are 6 days from the end of the billing cycle to the time bills are rendered; and there are 12 days from the date bills are rendered to the 'delinquent date shown on the bill'. Especially since the Company has not done a study to determine the average number of days from the date bills are rendered to the date payment is received, we agree with the staff that there is no sound basis for either of the assumptions underlying the Company's proposed "45-day" rule. Indeed, the Company's proposal in this regard is especially unwarranted in that it includes the effect of a negative purchased power expense of \$21,106,000 which has the effect of increasing the Company's claimed cash working capital allowance by \$2,638,000.

Since the negative purchased power expense is primarily a result of the Company's position as a net seller to the Southern Company Pool at rates that are not fully compensatory at the rate of return sought in this case, it is unreasonable to require ratepayers in Mississippi to support the plant and equipment used to make these sales and then add an additional rate base element of \$2,638,000 because MPCo does not receive the revenue from the pool sales on the day the sales are made.

As we have held in previous Orders, we again conclude here that the proper method to use in determining the cash working capital allowance for inclusion in the rate base is a lead/lag analysis. A lead/lag analysis measures the amount of capital, on average, that has to be provided by investors to the utility to pay those cash expenditures made during the period between the time service is rendered by the utility and the time the revenues are received for that service. That portion of the Company's gross cash requirement that is not supplied by investors but by vendors, employees, taxing authorities and ratepayers is not entitled to earn a return. In this regard, we adopt the approach presented by staff witness Clark which both estimates the lag in the receipt of revenues and determines leads and lags related to the cash expenditures incorporated in the total cost of service. Moreover, and in contrast to certain rulings which we have made in the past, based on less complete records, we here concur with the staff's recommendation to take account of lags in the payment of interest expenses and preferred stock dividends. The Company's interest expense on long-term debt issues is payable semi-annually in arrears. The funds for these payments are forwarded to the Trustee who makes the payment to the bondholders. Allowing 7 full days in advance of the due date for the Company to send the funds to the Trustee produces a lag in payment of interest expense of 84.25 days.

Similarly the Company's preferred stock dividend payments are payable quarterly in arrears. Allowing 7 full days for transfer of the funds from the Company to the paying agent yields a lag of 38.6 days. While recognizing that funds in the possession of the Company "belong" to the investor, we find that there is no distinction between funds held by the Company to pay interest expense and funds held by the Company to pay other obligations such as income taxes. Like other costs of operation, interest payments and preferred stock dividends are contractual obligations, and to the extent that these

funds represent a value in excess of that obligation, like accrued tax dollars, that should be treated as a working cash offset and not as an added bounty to be paid to the equity investor. We agree in this regard with previous findings by regulators in California and Iowa who held:

"The customers have provided the funds to be used to pay debenture interest. Respondent holds these funds and pays them to debenture holders at semi-annual intervals. Ratepayers should not be required to pay return on funds which they have already supplied and which respondent is merely holding to pay out to debenture holders." (53 PUR 3d, 513)

and

". . . [that] funds collected from the ratepayers to cover bond interest constitute corporate funds belonging to the stockholder, is false by definition having been based on an erroneous predicate. The fact of the matter is that these moneys are indeed contributed by the ratepayer and not the stockholder. . . . the purpose of a working capital allowance is not to give the stockholder a return on funds not provided by him, but rather to assure a fair return on no more than the actual funds contributed by that common stock investor."

As the Company's own expert accounting consultant, Mr. Gower, acknowledged in this proceeding, all of the Company's funds are ultimately derived from its ratepayers.

Excess Costs of Plant Daniel

One additional adjustment that the Commission feels is required is to eliminate the rate base effect of the excess cost of Plant Daniel unit No. 2. It is unthinkable to ask the Mississippi ratepayers to shoulder this additional burden. It seems obvious that any such cost increases should be borne by the ratepayers of Gulf Power Company. Although it is true that this Commission relied on the Company's projections and estimates and al-

lowed the Company to sell a one-half undivided interest in the Daniel Plant to Gulf Power Company, there was never a determination made that the proposed sale would impact Mississippi ratepayers to the extent that the Company now proposes. The Company's plant accounts will increase by an estimated \$38,000,000 when Plant Daniel unit No. 2 goes into commercial operation (currently estimated at May 31, 1981). The Company has not demonstrated to the satisfaction of this Commission that the ownership of a one-half undivided interest in both Plant Daniel units as opposed to the present ownership of only unit No. 1 will be any more beneficial to Mississippi ratepayers. The Company's proposal is unsupported in the record and not in the best interest of Mississippi ratepayers. Although the staff did not recommend the disallowance of the cost differential between units No. 1 and 2, other adjustments relating to unit No. 2 were supported and adopted by this Commission and the Commission is of the opinion that this further adjustment is necessary for ratemaking purposes. The Commission rejects the Company's proposal and orders the Company's rate base reduced by \$19,000,000 on a total Company basis.

Based on the aforementioned adjustments to the Company's proposed rate base, the Commission finds the proper rate base for the Company to be \$453,466,000 consisting of the following components:

RATE BASE	
	\$(000)
Utility Plant in Service	\$684,060
Less: Depreciation	200,806
Net Utility Plant	483,254
Add: Plant Held for Future Use	162
Working Capital	44,080
Unamortized Leasehold Improvements	25
	527,521
Deduct: Customer Contributed Capital	5,769
Accumulated Deferred Income Taxes	68,286
Total Utility Rate Base	\$453,466

III. REVENUES AND OPERATING EXPENSES

The Company has proposed a statement of income for the projected test year which the Commission is utilizing in this case. The proposed new rates are projected to produce \$39,306,000 in additional operating revenues for the test year. Total operating revenues for the test year without the proposed new rates are projected by the Company to be \$274,174,000 and with the proposed new rates total operating revenues are projected to be \$313,480,000 for the difference of \$39,306,000.

The Commission finds, consistent with the results based on other portions of the Order, that the increase of \$39,306,000 is unreasonable, unlawful, and unjustified. It constitutes an undue and unfair burden on the Company's customers and shall not be allowed by this Commission. The Commission's finding that the amount of the Company's proposed increase is excessive, unfair, and imposes a burden which the Company's customers should not have to bear is amply supported by testimony and exhibits of the Commission's staff witnesses and by the cross-examination record of the Company's own witnesses.

The staff has proposed several adjustments to the Company's claimed operating expenses. These adjustments are discussed seriatim.

Consolidated Tax Savings

The staff has accepted the Company's estimate of the consolidated tax savings of \$600,000. The Company's opposition to the recognition of these savings rests on the premise that, for ratemaking, the Company should be treated as a separate entity rather than as a subsidiary of The Southern Company. As we stated in our Order issued on March 7, 1980, in Docket No. U-3739 (The Company's last retail rate case) :

"It is patently obvious that if the Company's cost of service is not reduced by the tax savings resulting

from the filing of a consolidated Federal income tax return, the ratepayers are providing an outright gift to the Company and to the Company's parent and ultimately to the stockholders of the parent." (Mimeo, p. 18)

This Commission continues to believe that the tax savings resulting from the filing of a consolidated Federal Income tax return should be reflected in the cost of service.

Amortization of Deferred Income Taxes

In January of 1979, the corporate income tax rate dropped from 48% to 46%. Prior to that date, the Company had accumulated deferred taxes, resulting from its normalization accounting under I.R.C. § 167(1), in its reserve at the 48% tax rate. Since the tax rate has dropped, Dr. Wilson testified, there was \$1,984,000 accumulated in the reserve account representing the excess over the amounts that will be necessary to meet future tax obligations. Since this excess will not be used to meet tax obligations in the future, the staff proposes to amortize the amount over two years as an offset to operating expenses. This adjustment would increase net operating income by \$992,000. The Company opposes the adjustment on the grounds that it is an improper accounting procedure, and that it violates the provisions of § 167(1).

Mr. Blakeslee and Mr. Gower, who testified on behalf of the Company, are of the opinion that this adjustment violates Treasury Regulations § 1.167(1)-1(h)(2)(i). According to Mr. Blakeslee and Mr. Gower the most reasonable interpretation of this section is that the deferred tax reserve should be reduced in any taxable year by reference only to the tax rates applicable in such taxable year, regardless of whether such rates are higher or lower than the rates in effect for the year when the reserve was created.

The defense raised by the Company is that by returning the excess balance to the ratepayers, the use of accelerated depreciation will be lost. The Commission disagrees. The change in the tax rates means that the accrual for deferred taxes is too large and must be reduced. The Commission accepts the amortization of the excess balance over a two-year period. The two-year proposal is seen as the best way to minimize the difference between the ratepayers who provided the dollars and those who will receive the refund.

As this Commission has previously held, care must be given to adhere to present tax laws and regulations and the possible effect of any such adjustment on the tax reserves so accumulated. The rebuttal testimony offered by the Company supports the position that to adopt the adjustment recommended by the staff could jeopardize the entire Company reserve accumulated for deferred income taxes. However, the Company's own witness acknowledged, such an adjustment has been adopted in other jurisdictions, and no adverse IRS action has been taken. In this regard, we agree with the New York Public Service Commission, which recently found that similar arguments by a regulated utility on this issue were frivolous:

- "When the federal corporate income tax rate was reduced from 48% to 46%, an excess of \$41,842,000 in the Company's accumulated deferred income tax account was created . . . Staff recommended that the excess be returned over a five-year period; the CPB recommended two years; the Attorney General recommended one year . . .

The Company contended in oral argument before us that it is nonetheless possible that the IRS may prescribe the treatment recommended by staff and the Attorney General. In that event, the company is concerned its return of the excess over a short period of time will result in loss of its eligibility

for accelerated depreciation income tax benefits. We recognize the possibility that a future adverse IRS ruling could be applied retroactively to revoke the Company's tax benefit. For this to occur, however, the IRS would have to take the position that the existing statute, 167(e) of the Internal Revenue Code, required at all times whatever treatment is prescribed at that time by the IRS through its interpretive regulations. We believe that the risk of this occurring is so remote that it would be wrong to delay returning to consumers the excess accumulation solely on this basis." (State of New York Public Service Commission Opinion No. 79-22 issue November 9, 1979.)

Maintenance Expense

The Company in its filing requested \$23,256,000 for maintenance expense in the test year. Staff's proposed adjustment incorporated a methodology which took into consideration the trended effect of the various maintenance costs for the Company's plant and allowed for the inflation of maintenance costs over time. Utility rate-making is properly based upon the concept of normal conditions, and the projection of maintenance costs of the magnitude that the Company has suggested for the test year is not a normal condition. Indeed, the Company's witness on this subject acknowledged that the proposed figure contained several non-annual elements. The Company's abnormal forecast in this regard serves as an excuse for excessive rate increases beyond what would be needed under normal circumstances.

Moreover, there is no evidence that the Company has devoted adequate attention to improvements in labor productivity gains in the forecasted maintenance expense requirements. This is crucial, because projections that reflect increased labor input requirements and also higher wages, as the workload expands, but that do not reflect

labor productivity gains, are biased against the rate-payers.

If allowed, the budgeted test year maintenance costs presented by the Company would minimize the motivation of MPCo to achieve cost containment. Efficient operation is an important regulatory goal which is greatly minimized by the use of budgeted test-year cost increases such as the maintenance expense cost developed here by the Company.

The Commission finds in accepting the staff's reduction to the Company's filed maintenance expense for the test year, that the staff acted correctly by employing the Company's historically trended figures in conjunction with a methodology that attempts to recognize the effect of inflated maintenance costs into a test year period for ratemaking purposes.

Full Normalization

Staff witness Wilson presented testimony and exhibits on the subject of complete normalization of deferred taxes. The Commission recognizes that the inclusion of deferred income taxes in cost of service constitutes a deferral of income in the ratemaking process. The Commission also finds that there is no convincing evidence that the Internal Revenue Service will disapprove the interperiod allocation of the income tax effect of deferred income.

We find both that the staff's adjustment is based on sound ratemaking principles and that the adjustment does not preclude the Company from continuing to take accelerated depreciation.

After examining the recommendations made by all parties relating to full normalization, the Commission remains uncertain as to the effect of the adjustment in terms of Treasury Regulations. The Commission has been made aware that other utilities have been ordered

to seek IRS rulings on this issue. This Commission will, as we did in the Company's last retail rate case, defer determination of the issue and accept the Company's accounting procedures at this time with the unrestricted reservation that it may consider implementation of staff's recommendation in the future. The Commission believes that IRS will, indeed, support our position herein stated.

In summary, the Mississippi jurisdictional net utility operating income which the Company projects for the projected test year as adjusted without the new rates is \$32,857,000. This amount is accepted as a reasonable projection and is supported by the testimony and evidence in this case. This amount will be used hereinafter in this Order to determine the Company's revenue deficiency.

IV. COST OF CAPITAL AND RATE OF RETURN

The cost of capital to an electric public utility is important in that it provides the information necessary to determine a fair rate of return for the utility. The measurement of cost of capital is not an exact science, but extensive evidence has been presented in this case by competent witnesses covering the Company's capital structure, its cost of equity, and ultimately the cost of capital to the Company. Inherent in the testimony provided by both the Company and staff witnesses with regard to cost of capital and rate of return, is the use of reasoned judgment in consideration of the numerous factors which must be considered in arriving at cost of capital figures. This Commission reiterates its position that it will do the same in evaluating and weighing the testimony presented. This Commission will use reasoned judgment and not necessarily be restricted in our deliberations by precise calculations nor specific formulae. In this particular instance, the record contains most adequate and competent testimony and exhibits to support the conclusion reached by the Commission. Further, the finding with regard to the appropriate cost of capital

results in what this Commission considers to be a fair and appropriate rate of return for the Company in this case.

The reasonableness or unreasonableness of public utility rates is not to be determined by any definite rule or legal formula, and is not measureable with any degree of exactness, but is a question of fact calling for the exercise of sound discretion, good sense, and a fair, enlightened, and independent judgment. *Southern Bell Telephone Company vs. Mississippi Public Service Commission*, 113 S2d 622 (1959), *Blue Field Waterworks vs. PSC of West Virginia*, 43 Supreme Court 675, 262 US 679 (1923), *Federal Power Commission vs. Hope*, 64 Supreme Court 281, 320 US 591 (1944), 73 CJS, Public Utilities, Section 25A.

The standards are:

First, the return must be commensurate with returns on investment in other business enterprises having corresponding risks and uncertainties. Second, the return must be sufficient to assure confidence in the financial integrity of the business enterprise so as to maintain its credit and enable it to attract capital.

Based upon our application of those principles, we determine that the rate of return to the Company is 9.76 percent.

The principal cost of capital consultant used by the Company, Dr. Willard Carleton, presented testimony with regard to the Company's cost of equity, and this was utilized as a basis for the Company's ultimate proposed cost of capital and fair rate of return. The Company's proposed capital structure includes long debt, preferred stock, and common equity. Dr. Carleton proceeds to determine the cost of equity to the Company by using several methods, including discounted cash flow and risk premium approaches. His resulting cost of equity conclusion is in excess of 16 percent.

Utilizing this common equity return figure, and the Company's capital structure and senior security costs, the Company proposes an overall cost of capital of 10.595 percent.

This Commission has evaluated the testimony of Dr. Carleton and finds that it cannot be accepted as credible. When considered in the light of rationality, sound judgment and the other testimony introduced in this Cause, it is clear that the comparable returns generated by the electric utility industry are not at the return on common equity as contained in Dr. Carleton's testimony. The Commission finds that there are certain improper subjective judgments contained in the analyses of Dr. Carleton which result in a cost of equity in excess of that which is realistic based on current conditions.

Dr. Carleton offers two variations of DCF analysis: a finite horizon DCF estimate, and a "standard" DCF approach with modifications. His finite horizon DCF result is a cost of equity estimate in the range of 17.72 to 20.34 percent, and his "standard" DCF with corrections produces an equity cost rate of 20.36 to 24.43 percent.

The Commission finds that Dr. Carleton has departed from traditional DCF theory in some very serious ways which make the results of his DCF analysis invalid. All of his DCF exercises are based upon assumptions which are invalid and unsupportable. Indeed, Dr. Carleton does not offer much, if any, support for his various assumptions; he simply asserts that they must be true.

One erroneous feature of Dr. Carleton's DCF models is his modification for regulatory lag and its effect on investors' perceptions and therefore on their pricing behavior. He offers as support a six-year old study based on 1958-68 data. Clearly this study is out of date. Utility investors of 1981 are very likely to perceive the world differently from investors of the 1960's.

Dr. Carleton manipulates his DCF result so as to produce a particular market price, rather than accepting the actual market price. This negates the purpose of DCF which is to estimate the return which investors require on the price they are willing to pay for a company's common stock. In short, Dr. Carleton uses the DCF equation to alter price rather than to estimate the prevailing market cost of capital.

Therefore Dr. Carleton's DCF estimates are distorted and severely overstate investor return requirements.

Dr. Carleton's analysis is also conceptually inaccurate in that it presumes that the cost of equity capital must always exceed the cost of long-term debt.

As Dr. Wilson observed, it is a fallacy to argue that investments in common equities are invariably more risky by a fixed margin than investments in senior securities of the same company, especially for firms in regulated industries. It is true that investors in common equities bear a greater risk of capital loss through bankruptcy or other financial reverses to the issuing firm. But this type of risk is not the only risk borne by investors in corporate securities; and with respect to other risks, investments in common equities may actually be safer than investments in senior securities.

When an investor purchases bonds or preferred stock, he strikes a bargain fixed for the life of these securities. For a first mortgage bond, this bargain is typically a fixed semiannual or annual interest payment over the life of the bond, which is generally for 30 years, and then a return of the principal amount. For a preferred stock, the bargain has an even longer lifetime, consisting of a fixed annual dividend in perpetuity. With both of these types of senior securities, the investor risks making a bad bargain at the time of the security issue. If money costs and interest rates rise, the holder of this senior security cannot have the annual interest or dividend

payments increased, and therefore the market price of the security declines. This danger of fluctuation in the market price of a security, owing to changes in the costs of money, may be called "interest rate risk."

Investors in common equity, especially in regulated public utilities, need not bear this interest rate risk. The reason is that the rate of return is not fixed at the time the stock is issued. Public utility rates are set with regard to the embedded historical cost of senior capital, but they are based on the current cost of common equity. If money costs and interest rates rise, the company may apply for a rate increase, and the allowed return is calculated in most jurisdictions by applying the current cost of common equity to the entire book value balance of common equity invested in the company. This increase in the allowed equity return to reflect current money costs provides common stock investors with some protection from inflation which is not afforded to senior security investors. This possibility for increasing the rate of return on common equity provides a measure of protection for the common equity investor against interest rate risk, and this is a protection that is not available at all to investors in senior securities.

Because potential investors in fixed income securities are well aware of interest rate risks, they now demand interest rates and preferred stock dividends that are extremely high by historical standards because of higher inflationary expectations. But the current costs of common equity need not include any element of protection against possible future increases in money costs, because there will be an opportunity when those future cost increases occur (if they do occur) for regulatory commissions to raise the then current allowed rate of return on common equity capital. Therefore, Dr. Carleton has erred in asserting that equity costs necessarily exceed debt costs and his consequent common equity rate-of-return recommendation is also incorrect.

Mr. Honan, another witness on cost of equity capital, presented by the Company, testified generally on the importance of credit ratings and gave an assessment of the Company's relative credit worthiness rather than determining a specific cost of equity.

Mr. Honan testified that certain coverage levels were necessary in order to ensure/achieve a sufficient bond rating.

While the Commission recognizes the importance of quality credit ratings in order to ensure that a utility has adequate access to the capital markets, from the evidence in this record we conclude that, in fact, the Company has an adequate credit rating by Moody's and by Standard and Poor's. While Mr. Honan expressed concern with respect to the Company's rating, we find that he did not demonstrate adequately the basis for such a concern, other than to indicate that investors served by his Company would prefer higher returns.

In fact, it is this Commission's responsibility to determine the fair rate of return *required* by investors on the common equity of the Company. We are not required to determine the rate which they would *prefer*. We find that this approach may be useful for Mr. Honan's purposes in portfolio management. We have difficulty using the approach in the regulatory context.

On the other hand, the staff witness, Dr. John W. Wilson, presented thorough and comprehensive testimony with regard to an appropriate cost of equity for his conclusion on the Company's cost of capital. Dr. Wilson recognizes that the cost of equity to utilities has risen during the last several years but does not agree that it is as high as the Company's witnesses suggest. Dr. Wilson used two methods to estimate the cost of equity capital: (1) discounted cash flow analysis, and (2) earned returns comparison. Dr. Wilson developed cost rates for the capital components of debt, preferred stock, and com-

mon equity and applied them to an appropriate capital structure so as to develop the overall cost of capital. The Commission finds that the capital structure and common equity return recommended by Dr. Wilson to be appropriate to develop an overall cost of capital for the Company.

Dr. Wilson's analysis shows that a return on Mississippi Power's rate base in the range of 9.76 to 10.08 percent is required. We find that a return in this range is fair and reasonable, for it reflects the cost of the permanent capital which supports the Company's utility operations. This overall rate of return includes a return on Mississippi Power's common equity of 13.5 to 14.5 percent in combination with the senior security costs of the Company. This will provide a corresponding return to investors who own common stock in The Southern Company, thereby providing indirectly the equity capital of Mississippi Power. Within this range, it is our considered judgment that the lower amount, 9.76 percent, should be allowed in this case in recognition of the Plant Daniel unit No. 2 cost inefficiencies discussed previously.

SUMMARY

Pursuant to the decision herein rendered in this Cause, the Commission determines that the proper jurisdictional rate base, as hereinbefore discussed, is \$392,008,000. Similarly, the jurisdictional net operating income for the projected test year is \$32,857,000 before any allowed revenue increase. The Commission has determined that the required rate of return is 9.76%.

Based on the above, the Company does require an increase in the revenues to be collected from jurisdictional customers. This required revenue increase is \$10,877,000.

Although the increase in revenues which is allowed to the Company in this order is substantially lower than that sought by the Company, the Commission finds that the

substantial evidence in this record supports a conclusion that these additional revenues will produce a rate of return sufficient to enable the Company to attract capital, to maintain its financial integrity, to cover its increased cost and provide for future adequate and dependable electric service to its customers and service area. Further, the aforesaid level of revenues will permit the Company to maintain its coverages for the issuance of additional capital to provide adequate and dependable electric service.

COVERAGES

The Commission is aware of the importance of adequate coverages for preferred stock and first mortgage bonds and recognizes that sufficient coverages should be considered in any ratemaking procedure.

The Commission finds that the Company has not challenged the adequacy of coverage for first mortgage bonds and that the increases herein allowed are more than adequate to provide reasonable and sufficient coverage for first mortgage bonds.

The Commission finds that whereas the Company's witness contended that the staff's rate recommendations would fail to provide adequate coverage for new additional preferred stock issues, the computations offered in support of that contention were distorted both by overstated interest costs and by understated revenues. Corrected for these deficiencies, the Commission finds that even the Company's own coverage computation method reveals that both bond interest and preferred stock dividend coverage will be adequate under the staff's revenue proposal. Moreover, the Company has available to it a wide variety of financing options in addition to the issuance of additional preferred stock sales which will be fully adequate to meet foreseeable capital investment needs.

B. ORDER OF THE COMMISSION

Pursuant to the comments, conclusions, opinions, and specific findings of fact hereinabove stated, it is, therefore, hereby ordered by the Commission that:

1. The schedule of rates and charges and proposed changes as herein filed by the Company is found to be unfair and unjust and results in unreasonable, excessive, and discriminating compensation to the Company and that same be and are hereby denied except as hereinafter provided.

2. A retail rate base of \$392,008,000 is found to be a fair and just retail rate base in this matter, allowing the Company full advantage of projected gross plant and such other additions as deemed necessary.

3. The revenue increase requested by the Company is found to be unfair, unjust, and results in unreasonable, excessive, and discriminating compensation to the Company and that same should be and hereby is reduced by the difference between the requested amount of \$39,306,000 and an increase of \$10,877,000 and that such increase will allow the Company to earn a net operating income of \$38,260,000 from the jurisdictional customers.

4. The Company shall be allowed the opportunity to earn a fair and reasonable rate of return of 9.76% on the heretofore established rate base. The heretofore allowed revenue increase will allow the Company such an opportunity.

5. Within thirty (30) days of the date of this ORDER, the Company is directed to file revised rate schedules and support thereof that comport to all aspects of this ORDER.

6. The Company shall refund to each of its customers the revenue collected by it under the rate schedules in effect under bond in excess of the increased revenues provided by the rates as herein allowed by the Commission

plus interest at the per annum rate provided by law. Such refund shall be paid by check or provided to the customers as a credit on a single billing cycle bill as deemed appropriate by the Company. Any refund due a customer that exceeds the single billing cycle bill for electric service at the time refund is made shall be paid by check.

7. Within thirty (30) days after the completion of the aforesaid refunds, the Company shall file a certificate of compliance stating that all refunds have been made and showing the amounts refunded by type of service. Upon the filing of such certificate, and the approval thereof by the Commission, the principal and surety on the refunding bond heretofore filed by the Company shall be discharged.

ORDERED by the Commission on this, the 16th day of April, 1981. Voting "Aye" were Commissioners D. W. Snyder and Lynn Havens. Voting nay: None.

[SEAL]

/s/ E. W. Robinson
E. W. ROBINSON
Executive Secretary

cc: List on file

APPENDIX B

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. 116,202

MISSISSIPPI POWER COMPANY,
Appellant

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Appellee

[Filed Mar. 19, 1982]

OPINION OF THE COURT

This is an appeal by Mississippi Power Company (hereinafter referred to as Company) a public utility, from an order of the Mississippi Public Service Commission (hereinafter referred to as Commission) issued on April 16, 1981, allowing an increase in revenue in the form of rates in the sum of \$10,877,000 of the total increase of revenue sought by the Company in the amount of \$39,306,000.

On October 20, 1980, the Company filed with the Commission a Notice of Change in Rates to become effective on November 20, 1980. The Commission, by order dated October 24, 1980, suspended the proposed rates for a period of 90 days from and after November 20, 1980, and thereafter issued an order extending the suspension for a period not to exceed six months from the time of filing. On November 10, 1980, the Company filed a refunding bond as provided by law, said bond was approved by order of the Commission and the rates were placed into effect subject to refund on November 20, 1980.

The Commission ordered hearings with respect to the proposed rates and hearings were held from time to time in April, 1981.

After all hearings were concluded, the Commission entered its order on April 16, 1981, allowing an increase in revenue in the form of rates in the sum of \$10,877,000 of the total increase of revenue sought by the Company of \$39,306,000. In so doing, the Commission made some nine adjustments to the Company's rate base, two adjustments to the Company's estimated expenses shown on the operating statement and reduced the requested overall rate of return from 10.595 percent to 9.76 percent.

A Petition for Rehearing was filed by the Company and was denied by order dated April 28, 1981.

Briefs were filed by the parties hereto in September, October and December of 1981. Oral argument was heard in December of 1981. The record in this cause consists of twenty-two volumes totaling 2,337 pages.

The role of this Court on such appeals is dictated by Section 77-3-67, Mississippi Code of 1972 Annotated. This section provides inter alia . . . "The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the Court finds that the order of the Commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights."

In this appeal the Company has assigned Twenty errors and contends that it should have been granted the full requested increase of \$39,306,000.

The Commission reduced the rate base of the Company by some \$19,000,000 because it found that Unit 2 of Plant Daniel exceeded the cost of Unit I. The Company had sold an undivided one-half interest in Plant Daniel Unit I to Gulf Power Company and purchased an un-

divided one-half interest in Plant Daniel Unit 2 from Gulf Power Company. The Commission found that while it had previously approved this transfer the transfer was approved based upon the cost estimates of the Company which were approximately half of the amount shown in the present case; that the increase was due to cost overruns and construction delays of Gulf Power Company and not the Company and that such increase should be borne by the ratepayers of Gulf Power Company and not the ratepayers of the Company.

Mr. H. H. Bell, Jr., a Vice-President of the Company, testified that the agreement with Gulf Power Company stated that the Company would share equally in the total cost of the plant at the time of commercial operation. The Commission takes the position that in 1977 the Company reported that the cost to the Company would ultimately amount to \$16,000,000, while the amount actually proposed as a rate base addition in this case is \$38,000,000.

In addition to disallowing a portion of the cost of Plant Daniel the Commission further reduced the Company's rate base by the amount of \$1,138,500 representing the difference in the cost of coal cars originally purchased by the Company for use in operating Unit I and the cost of coal cars to Gulf Power Company several years later obtained for use in providing fuel for Unit 2 of Plant Daniel. The Commission had approved the transaction, the Company contends, when the approval was given as between the Company and Gulf Power Company.

It must be noted that no evidence was presented by any staff witness recommending that the Commission make the adjustments mentioned with reference to the exchange with Gulf Power Company.

The Commission found that the transaction with Gulf Power Company, when approved by the Commission in Docket U-3168, stated that after Plant Daniel Unit No. 2 was completed, necessary adjustments would be made so

that each party would have a 50% ownership in both units and the common facilities, but appropriate rate treatment with respect to the sale was not specified at that time.

Nowhere in its findings did the Commission set forth any explanation of how it arrived at the \$19,000,000 figure except that this was one-half of the \$38,000,000 increase as shown by the Company. This was in the face of a detailed account by H. H. Bell, Jr., of the circumstances involved in the decisions made by the Company with reference to the increase in cost. No proof was offered by the Commission to show that the business decisions made by the Company in this regard was unreasonable.

This Court finds that the Commission's order reducing by half the \$38,000,000 figure was an abuse of discretion by the Commission and was not supported by the evidence.

As stated in Appellant's brief, a regulatory Commission may not, under the guise of regulation, usurp the functions of management, and, with hindsight, fail to give effect to a management decision based upon a reasonable business judgment when made.

The same finding by this Court would likewise apply to the reduction in the cost of the coal cars.

The Company projected average test year fossil fuel stock balances of \$69,187,000. This represented an increase of approximately 81%. Accepting the recommendation of staff, the Commission established an average test year fossil fuel balance of \$40,278,000, a reduction of \$28,909,000.

The staff witness, Clark, testified with reference to the fuel stock balance as follows:

"The Commission's order in the Company's last retail rate case, MPSC Docket No. U-3739, allowed an average fuel stock balance of \$30,764,321, based on

ninety days of projected burn and the Company's projected average prices. My recommendation in this proceeding of \$40,278,000 represents an increase of approximately \$9,514,000, or 31 percent. I believe this increase is sufficient given the fact that the two test years are separated by only thirteen months. This is especially valid given that MPCO has no additional coal fired generation on line in the projected test year in this case.

"My recommended increase of \$9,514,000 allows for increased tonnage to the extent needed to meet projected burn requirements as well as the Company's projected increased average prices."

The Company contends that the large increase is necessary because of long term contracts, variable climate conditions of the service area, and the effect that a strike might have on the delivery of coal. In short, the Company says that the level of full stocks is a matter that should be left to decision of management.

In light of the fact that the witness Clark testified that in the last rate case involving the Company the average fuel stock balance of \$30,764,321, was based on 90 days of projected burn and in this case the Commission has allowed an increase of approximately \$9,514,000, or a 31% increase, this Court cannot say that the finding of the Commission is not supported by substantial evidence or is contrary to the manifest weight of the evidence.

The Company requested \$23,256,000 maintenance expense for the test year. The Commission reduced the allowance \$3,177,000 based upon the testimony of Dr. John Wilson. Dr. Wilson's recommendation for the 1981 test year was based upon the Company's tract record as published in final form from 1976 to 1979. Although it was available to him, Dr. Wilson did not use the actual 1980 maintenance expense of \$21,138,000 to determine the trend.

This Court is of the opinion that it was error for the Commission to ignore the actual maintenance as shown by the Company for 1980 and base its finding on the testimony of Dr. Wilson based upon the 1976 to 1979 trend.

The Commission reduced the Company's requested cash working capital from \$25,714,000 to \$523,000, a reduction of \$25,191,000. This reduction was made upon the testimony of the staff witness, Clark. This witness based his reduction of cash working capital upon the basis of lead/lag studies made with other utilities at other times. The Company had requested that the witness provide it with the lead/lag studies he had made on the other utilities but he did not do so and stated that he did not have them. The Company objected to this testimony based on the unproduced studies and was overruled. A part of Mr. Clark's testimony is as follows:

Q. Yes. You said that you participated in the preparation and that you estimated the lags based on your experience and participating in preparation of lead-lag studies for other similar utilities.

A. Uh-huh, yes.

Q. Now, did you do a statistical analysis on Mississippi Power Company's leads and lags?

A. No.

Q. Did not, okay. The, when we requested in our data request that you give us copies of the lead-lag studies that you had done for other similar utilities, you stated that these were not available, is that correct?

A. I thought I stated they were not in my possession. I don't know exactly what the response was. In any effect, I didn't have them.

Q. You did not have them.

A. That's correct.

Q. And so they were not made available to us. And, in addition to that you used statutory provisions of the Mississippi and Alabama and federal laws, is that right?

A. Yes.

In the case of *Miss. Public Service Comm. vs. Miss. Power Co.*, 366 So.2d 656, the Court said:

"Dr. Bicksler used printouts from the Center for Research for Security Prices, based in Chicago. These are referred to as 'CRISPE tapes' and received treatment by us in Mississippi Valley Gas, 1978, supra. Dr. Bicksler testified in that case, using CRISPE tapes. There, the company had moved for an order to direct Dr. Bicksler to 'furnish the written material, documents, letters and data fed to the computer, and the questions asked and tasks assigned, to the computer, for the purpose of cross-examining Dr. Bicksler about the CRISPE tapes.' Later renewed, the motion was denied by the Commission. This Court there said as the chancellor had said, 'Dr. Bicksler might have reached the right result, but in the present state of the record there is no way to tell.' Since Dr. Bicksler's testimony was largely based upon the unauthenticated tapes about which he testified, but did not produce, the chancellor here correctly held that the Commission could not properly rely upon his testimony in this important matter, even though he gave other testimony unrelated to the tapes."

Inasmuch as the witness Clark testified (over objection) that he estimated the lags based on his experience and participating in preparation of lead/lag studies for other similar utilities followed by his statement that he had not given the Company this information, it was error for the Commission to admit the testimony or to rely upon it. His study was properly titled by the Company witness Grower as a "phantom" study.

The Company requested that there be included in rate base construction work in progress with respect to those items which were to be complete within the test year and which were non-revenue producing. In its Order, the

Commission deleted this \$18,354,000 item thereby reducing MPCo's requested increase in revenues by \$958,000.

The Commission found that the construction work in progress should not be included in the Company's rate base because such investment is not used and useful in the rendition of electric service to the ratepayers. That where a projected test period is used it is inappropriate to reach beyond the end of a projected test year to include construction work in progress in the rate base. The Commission further found that the inclusion of construction work in progress in the rate base is not a general practice in this jurisdiction.

It is noted that the Commission, in the last company rate case, allowed the use of a projected or budgeted test year. This was testified to by the staff witness, Clark. Mr. Clark further testified that it is necessary for the Company to continually maintain a construction program.

The Company contends that in a recent South Central Bell case (Docket U-3804) the Commission found that "the company must continuously have a large investment in telephone plant under construction."

The Company further contends that it did not request a rate increase based upon the inclusion of revenue producing items but did request that the rate base include \$8,804,000 which represented the cost to be incurred during the test year of plant items which are not revenue producing.

The Court finds that it was error for the Commission to eliminate from rate base the cost of construction work in progress with respect to plant items which are not and will not be revenue producing.

The Company has accumulated certain deferred income taxes at the rate in effect when the accruals were made—initially at a 48% tax rate, and in later years at a 46% tax rate. The amount of accumulated deferred taxes is

\$1,984,000 greater than it would have been if all had been accumulated at 46% rate. The Commission has accepted the recommendation of Staff witnesses that this amount of \$1,984,000 be returned to ratepayers by amortizing the amount in two years—\$992,000 per year. The Company agrees with the Commission that the amount should be returned to the ratepayers and has always amortized these amounts to the benefit of the ratepayers at the rate at which the funds were accumulated over the life of the property which gave rise to such taxes. The Company does not agree with the period of years for amortization. The issue is the appropriate period over which it should be returned.

MPCo contends that the amount should be amortized over the life of the property, the depreciation on which gave rise to the accrual.

The Company takes the position, as testified to by the witnesses Gower and Blakeslee, that the Commission's order, if followed, would result in a violation of Section 1.67 (1)-1 (h) (2) (i) of IRS regulations, and could result in loss of the Company's right to take advantage of accelerated depreciation—an eventuality which would substantially increase cost of service and result in higher rates to consumers.

The same recommendation was made by Staff to the Commission in Docket U-3850, Mississippi Power & Light Company, and was rejected by the Commission in that case by its order dated November 24, 1980. There the Commission said:

The staff witness recommends an adjustment to the Company's net utility operating income to amortize certain excess income tax reserve. This adjustment is based on testimony which attempts to support the adjustment by showing the average change in accumulated deferred taxes which results from the recommended amortization of deferred taxes col-

lected in excess of the currently effective 46 percent Federal income tax rate. In the historical year this adjustment would have resulted in the addition of approximately \$456,146 to net utility operating income.

While it is the desire of the Commission to carefully consider any reasonable or proper "flow-through" adjustment which may benefit the ratepayer, care must be given to adhere to present tax laws and regulations and the possible effect of any such adjustment on the tax reserves so accumulated.

The rebuttal testimony offered by the Company supports the position that to adopt the "flow-through" adjustment recommended by the staff witness could jeopardize the entire Company reserve accumulated for deferred income taxes. Further, such an adjustment has been denied in other jurisdictions and at this time, until the issue is finally settled, the Commission is unable to accept this recommendation.

Certainly the Company is entitled to equal treatment with Mississippi Power & Light Company. This Court finds that the ratepayer should receive the benefits of the accumulated deferred income taxes but that amortization should be made over the useful life of the property giving rise to the funds.

The Commission found that the revenue requirements of the Company should be reduced based upon a tax saving resulting from the consolidated return of Southern Company, the parent Company. The Commission accepted the Company's estimate of the consolidated tax savings of \$600,000. The Company contends that, for ratemaking, this should be treated as a separate entity rather than as a subsidiary of the Southern Company.

As shown in this record, the Connecticut Public Utilities Commission said . . . "a utility cannot charge its customers more for taxes than the actual amount paid or

more than its equitable share of the consolidated tax liability." Further, the Commission stated in its Order issued on March 7, 1980, in Docket No. U-3739, the same being the Company's last retail rate case, the following:

"It is patently obvious that if the Company's cost of service is not reduced by the tax savings resulting from the filing of a consolidated Federal income tax return, the ratepayers are providing an outright gift to the Company and to the Company's parent and ultimately to the stockholders of the parent."

This Court is of the opinion that the Commission was justified in this finding and that it was not error to so hold.

With reference to Average Net Plant the Commission stated:

In Docket No. 3739 the Commission accepted the use of beginning and end test year average method of quantifying net plant. The Company has used such an approach in its filing in this case and the staff does not dispute the application of such an averaging concept. However, whereas the Company's proposed rate base is based on the average of projected beginning and end of year figures, the staff is persuasive in explaining why that approach is less accurate than the alternative available here of using an actual beginning year figure. This allows for the rate base inclusion of all the reasonable projected plant additions up to November 1981, which will be in service prior to the close of the test year.

The Commission's Rules of Practice and Procedure provide that when a notice of increase in rates is filed, the utility must present a balance sheet and income statement based upon an estimated or projected basis for the test period. This was done in this case by the Company through the use of its actual budget

developed by regular procedure. The witness Clark used certain selected (not all) net plant balances which he determined from MPCo's answer to data requests in lieu of the Company's projections. He also used actual beginning figures.

In Opinion No. 44 issued June 28, 1979, in Public Service Company of Indiana, ER 76-149 and E-9537, an attempt was made by the intervenors to update what were projected figures for Period II by the use of actual figures for the time frame covered by Period II. As the Commission stated:

The issue before the Commission is whether to accept PSCI's Period II (future test year) cost of service data in their entirety as reasonable for ratemaking purposes or whether PSCI should lower its net purchased power expense estimate by at least \$3,-273,000 as Intervenors urge, to more fully reflect actual offsetting sales of power to neighboring utilities in that period.

The Commission said that it would not allow projected figures for Period II to be adjusted so as to reflect actual values, but would continue to base their decision upon the projected figures furnished by utility. The Commission states the following:

In declining to give effect to the increase in demand revenues (from power sales) suggested by Intervenors, we also are mindful of our established general policy against making such spot adjustments of future test year estimates, a policy which seems persuasive here. The practical demands of efficient ratemaking by an administrative agency necessarily favor a degree of *finality* to the estimating process, and a noncommitant cure to the "moving target" problem. To give effect to spot adjustments without adherence to the standards paid out above for successfully challenging a particular estimate as unrea-

sonable could bring about the erosion of the entire future estimates system.

The decision of FERC was appealed by the Intervenor to the United States Circuit Court of Appeals for the Seventh Circuit and the Commission's holding affirmed. That decision is *Indiana Municipal Electric Assn. vs. Federal Energy Regulatory Comm.*, 629 F.2d 480 (CCA 7th 1980).

After noting that FERC had rejected the suggestion by Intervenor that the actual figures for Period II, known at the time of hearing, should be substituted for projected figures, the Court states at page 483:

To require a re-working of utility's estimated costs in light of subsequent actual costs not only would result in interminable delays in already lengthy rate proceedings but would encourage delatoriness in challengers in the hope that history would spoil the utility's estimated cost of service.

It is the opinion of this Court that it was error for the Commission to utilize a part of the test year based upon projections and another party based on actual figures as they become available.

The Commission recognized that the Revenue Act of 1971 prohibits rate base reduction by the unamortized balance of accumulated deferred investment tax credits under the accounting methods chosen by the Company, but found that there was no such prohibition with respect to the unamortized balance of pre-1971 accumulated deferred investment tax credits relating to the Revenue Act of 1962. The Commission further found that the accumulated balance of the pre-1971 investment tax credits represents cost-free, customer-contributed capital. The Commission further found that the ratepayers should receive the benefit of a rate base deduction equal to the average balance of the pre-1971 accumulated deferred investment tax credits which amount to \$1,757,279.00.

It is noted that the Commission in an order entered November 24, 1980, (Exhibit 94), just a few months before the order entered in the present case, in Docket U-3850, refused to deduct accumulated deferred investment tax credits on the books of MP&L prior to 1971. In that case the Commission dealt with the interpretation of current income tax laws and stated:

Customer deposits and advances are not actually cost free capital, and accumulated deferred investment tax credit will not be deducted from rate base on certain interpretations of current income tax laws and regulations.

Here, again, we find the Commission applying one set of rules to one electric utility and a different set to another. This Court finds that such action is a violation of equal protection and is also contrary to the evidence in this case.

The Commission, as proposed by staff, reduced the Company's rate base by estimating Property Insurance Reserve, Injuries and Damages Reserve and Customer Advances for Construction. The Commission stated as the reason for this that their reserves are customer-contributed capital and that the Company has use of such until such time as the reserve accounts must be debited for a loan or the advances are refunded.

In lieu of insurance MPCo maintains reserves to cover the cost of replacement of plant items which may be damaged by a storm and a reserve for amounts MPCo may be legally obligated to pay by way of damages to persons, injuries or property damage as a result of its operations. The testimony shows that the insurance premium for complete coverage for injuries or property damage would exceed the annual amounts listed as expenses which go into these reserve accounts. In the Mississippi Power & Light Company order dated November 24, 1980, the Commission found that "customer deposits and advances are not ac-

tually cost free capital . . ." The Commission now some four months later treats the Company in a different manner than Mississippi Power & Light Company, without explanation. Here, again, we have one set of rules for one electric utility and a different set for another. That is, in this Court's opinion, a violation of equal protection.

The Commission allowed the Company a 13.5 percent return on common equity and 9.76 percent on an adjusted retail rate base. In this connection, the Commission found:

Dr. Wilson's analysis shows that a return on Mississippi Power's rate base in the range of 9.76 to 10.08 percent is required. We find that a return in this range is fair and reasonable, for it reflects the cost of the permanent capital which supports the Company's utility operations. This overall rate of return includes a return on Mississippi Power's common equity of 13.5 to 14.5 percent in combination with the senior security costs of the Company. This will provide a corresponding return to investors who own common stock in The Southern Company, thereby providing indirectly the equity capital of Mississippi Power. Within this range, it is our considered opinion that the lower amount, 9.76 percent, should be allowed in this case in recognition of the Plant Daniel unit no. 2 cost inefficiencies discussed previously.

The Company contends that if Dr. Wilson had used current data his recommendation on rate of return would have exceeded the amount sought by the Company. In its filing the Company requested an increase in retail rates which would produce a return on common equity of 16.04 percent and 10.595 percent return on the retail rate base.

Two expert witnesses in the field of finance testified for the Company. Dr. Willard Carleton concluded that at a minimum the Company should be allowed to earn between

17 and 17.5 percent on common equity with a minimum return on retail rate base of 10.904 percent.

Mr. Honan set the rate of return at 19.29 percent.

It is clear to this Court that Dr. Wilson did not use current data in his recommendations. The affidavit to his testimony is dated February 17, 1981, while his testimony was given on March 6, 1981. Dr. Wilson admitted on the date of his testimony that the average range for long term bonds for A or B aa rated utilities was 14.95 to 15.67%.

In the case of *Bluefield Water Works Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 67 L.Ed 1176 (1922), the United States Supreme Court stated the following rule:

A public utility is entitled to such rates as will permit it to earn a return on the value of property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.

The Mississippi Supreme Court has adopted the rule laid down in *Bluefield*.

This Court finds that the cost of capital and the allowed rate of return is unsupported by the evidence and contrary to the overwhelming weight of the evidence.

Mississippi Legal Services Coalition and others took part in the hearing before the Commission. They filed an Assignment of Errors and brief with this Court. The Company filed a Motion to Strike. This Court is of the opinion that the Coalition had a right to participate in this cause and that the Motion to Strike is not well taken.

Turning now to the brief of the Coalition and others we find that the main point raised by these Appellants is

that the Commission should allow no rate increase to the Company until the Company provides the Commission with all data necessary to assess the impact of any rate increase upon the Consumers of electric power furnished by the Company. In short, the Coalition contends that before the Commission should consider a rate increase the Company should make a study within its certificated area to determine the impact such increase would have upon consumers with emphasis on low income consumers.

These Appellants further contend that the impact of a rate increase creates two classes of citizens: those who can afford to pay the increased rates and those who, because of their poverty, cannot afford to pay for the use of electric power. Such distinctions based on class, they say, violate the Equal Protection Clause of the United States Constitution.

While no Mississippi case has spoken directly to this point, cases from other jurisdictions have.

In *West Jefferson Power & Light Co.*, PUR 1933D, 164 (Ohio, 1933), the Commission said:

Unfortunately it is impossible for us, under the law, to fix a rate that may depend upon the cost of commodities, except so far as the price levels may affect the value of the property used and useful. The rate cannot be fixed upon the ability of the customer to pay. The law provides such a rate shall be fixed as to give a just return to the utility for the property used and useful in supplying service.

In *Mountain States Tel. Co.*, 22 PUR 3d, 490, 496 (Idaho, 1958), the Commission said:

Other objections were made that farm income was down and that the general economy was such that Idaho customers could not stand the telephone rate increase. While farm income is not at the level desired, rates for telephone service cannot and should not be predicated on the level of that income.

In *Telluride Power Co., v. Public Utilities Commission of Utah*, 8 F. Supp. 341, 5 PUR NS 199, 203 (Dist. Ct. Utah 1934), the court stated:

We cannot agree that any opinion of the United States Supreme Court sustains the proposition that in fixing fair and reasonable rates the customer's ability to pay and the value of the service to him are paramount and controlling.

This Court is of the opinion that the Commission did not error in declining to grant to the Company any increase at all and there is no merit to the contention of the Coalition that a study should first be made as to the impact on consumers before the Commission could consider a rate increase.

The Commission's order entered in this cause will be vacated and the matter remanded to the Commission for such further proceedings, not inconsistent with this opinion.

This 19th day of March, 1982.

/s/ Joe G. Moss
JOE G. MOSS
Chancellor

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. 116,202

MISSISSIPPI POWER COMPANY,
Appellant

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Appellee

[Filed Mar. 30, 1982]

ORDER

THIS DAY THIS CAUSE came on to be heard on motion of Mississippi Power Company, Appellant in the above styled and numbered cause, for clarification of a portion of the Opinion of the Court entered on March 19, 1982, and after hearing statements by counsel for Appellant and Appellee, and after otherwise being fully advised in the premises, the Court is of opinion said motion should be sustained.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the last paragraph on the last page of the Opinion of the Court dated March 19, 1982, which provides as follows:

The Commission's order entered in this cause will be vacated and the matter remanded to the Commission for such further proceedings, not inconsistent with this opinion.

be and the same is hereby deleted by reference.

It is further ORDERED, ADJUDGED AND DECREED that the following paragraph be substituted for the paragraph quoted above in said Opinion of the Court:

54a

The Commission's order entered in this cause will be vacated and set aside and the matter remanded to the Commission for the entry of an order, not inconsistent with this opinion.

ORDERED, ADJUDGED AND DECREED this 30th day of March, 1982.

/s/ Joe G. Moss
JOE G. MOSS
Chancellor

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. 116,202

MISSISSIPPI POWER COMPANY,
Appellant
vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Appellee

[Filed Mar. 30, 1982]

DECREE

THIS CAUSE came on to be heard on an appeal by Mississippi Power Company, Appellant, from an order of the Mississippi Public Service Commission, allowing an increase in revenue in the form of rates in the sum of \$10,877,000 of the total increase of revenue sought by the Company in the amount of \$39,306,000.

The Court requested and received briefs from Appellant, Appellee and Mississippi Legal Services Coalition. The Court also heard oral argument of counsel for all parties and has studied and reviewed the record made in this cause before the Commission.

The Court has issued its Opinion on March 19, 1982, and incorporates the same in this Decree by reference and makes said Opinion a part hereof. After the Court filed its Opinion dated March 19, 1982, Mississippi Power Company, Appellant, filed its motion requesting the Court to clarify a portion of the Opinion of the Court. After hearing from counsel for Appellant and Appellee, the Court has sustained motion of Mississippi Power Company by Order dated March 30, 1982, and said Order is incorporated herein by reference and made a part hereof.

It is, therefore, pursuant to Opinion of this Court dated March 19, 1982 and Order of this Court dated March 30, 1982, ORDERED, ADJUDGED AND DECREED that the Order of the Commission dated April 16, 1981 be and the same is hereby vacated and set aside, and this matter is remanded to the Commission for the entry of an order, not inconsistent with the Opinion of this Court dated March 19, 1982.

ORDERED, ADJUDGED AND DECREED this the 30th day of March, 1982.

/s/ Joe G. Moss
JOE G. MOSS
Chancellor

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,059

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

v.

MISSISSIPPI POWER COMPANY

EN BANC

BROOM, PRESIDING JUSTICE, FOR THE COURT:¹

Electric power rate increases pursuant to Mississippi Code Annotated §§ 77-3-37,-39 (1972) were sought by Mississippi Power Company (MPC) before the Public Service Commission (PSC) which, by order dated April 16, 1981, in part denied the increases. MPC had filed a refunding bond pursuant to § 77-3-39, *supra*, thereby placing the rates in effect. MPC appealed to the Chancery Court of the First Judicial District of Hinds County, the Honorable Joe Moss, Chancellor. From the March 19, 1982, chancellor's decree largely favorable to MPC, direct appeal to this Court was taken by PSC, and cross-appeal was taken by MPC. Pertinent facts will be stated in this opinion as appropriate to the issues argued.

MPC, in seeking the proposed rate increase, contended that its total rate base to be utilized in determining the net operating income requirements was approximately \$554,000,000. Included in MPC's calculation of the rate base was over \$40,000,000 attributable to contract adjustments between MPC and Gulf Power Company with respect to the acquisition of $\frac{1}{2}$ interest by each Company in the Jackson County steam generation plant (Plant Dan-

¹ That part of the Court's opinion designated PART I is authored by Dan Lee, Justice, to which Broom, P.J., dissents.

iel), and for the purchase of certain railroad cars to be used in transporting coal to Plant Daniel.

PSC determined that, of this approximately \$40,000,000 which MPC had included in the rate base, \$19,000,000 associated with Plant Daniel adjustment payments to Gulf Power Company, and over \$1,000,000 associated with coal car payments to Gulf Power Company, were not to be included in MPC's rate base because the transaction between MPC and Gulf Power had resulted in no additional electric generating capacity for the benefit of MPC's customers.

PART I,

BY DAN LEE, J., FOR THE MAJORITY:

THE PLANT DANIEL TRANSACTION

Mississippi Code Annotated section 77-3-39 (1972) authorizes the PSC to establish rates that are just and reasonable to the taxpayers and which will yield a fair rate of return to the utility for its services. Because public utilities are monopolies engaged in the business of furnishing necessary services to the public, the PSC is, in effect, the counterpart of the marketplace by which other businesses are measured. The intent of the legislature in creating the PSC was an effort to impose an authoritative body between the ratepayers of the utility and the investors in the utility so that their respective interests, necessarily antagonistic, might be equitably served.

The PSC's rate-making decisions are never final due to the fluctuation of prices, inflation, business movement and other factors affecting their operations. Such variables necessitate applications for rate adjustments by the utilities for their very existence which necessarily impinge upon the pocketbooks of the utilities' ratepayers. To preserve a balance of the equities and lend stability to this ever present factor between investors and con-

sumers, the legislature has established a standard of just return to the utility and reasonable rates to the consumer. *Accord* State of Mississippi, et al. v. Mississippi Public Service Comm'n., No. 53,709, decided March 9, 1983, not yet reported.

In *Southern Bell Tel. & Tel. Co. v. Mississippi Public Service Comm'n.*, 237 Miss. 157, 113 So.2d 622 (1959), this well-established principle was construed:

The reasonableness or unreasonableness of the rates charged, or to be charged, by a public utility for its service or produce is not to be determined by any definite rule or legal formula, and is not measurable with any great degree of exactness, but is a question of fact calling for the exercise of sound discretion, good sense, and a fair, enlightened, and independent judgment. In determining whether a rate is reasonable, each case must rest on its special facts. 73 C.J.S., 1032, Public Utilities, par. 25a, and cases cited.

* * * *

What appellant in this case is entitled to is "just and reasonable" rates which will yield "a fair rate of return" to the appellant upon the reasonable value of the property used or useful in furnishing service. A fair return is one which, under prudent and economical management, *is just and reasonable to both the public and the utility*. From the standpoint of the Company it is important that there be enough revenue not only for operating expenses but also for the capital cost of the business, which includes service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments and other enterprises having corresponding risks and sufficient to assure confidence in the financial integrity of the business. *What the public is entitled*

to demand is that no more be exacted from the rate payers than the services are reasonably worth.

(237 Miss. at 238,241, 113 So.2d at 654,656) (emphasis ours).

The legal principles relating to the PSC's authority in establishing rates are well settled and have not been subject to any substantial change. They are:

1. The burden of proof rests on the public utility to establish the reasonableness of new rates. *Southern Bell T. & T. Co. v. Mississippi Pub. Serv. Com'n.*, 237 Miss. 157, 113 So.2d 622 (1959).

2. *The commission, with its expertise, is the trier of facts and within this province it has the right to determine the weight of the evidence, the reliability of estimates and the credibility of witnesses.* *Capital Electric Power Ass'n v. Mississippi Power & Light Co.*, 216 So.2d 428 (Miss. 1968); and *Southern Bell T. & T. Co. v. Mississippi Pub. Serv. Com'n.*, 237 Miss. 157, 113 So.2d 622 (1959).

3. The order of the commission is *presumptively valid.* *Loden v. Mississippi Pub. Serv. Com'n.*, 279 So.2d 636 (Miss. 1973).

4. The reasonableness of rates charged, or to be charged, by a public utility is not determined by definite rule or legal formula, but is a fact question requiring the exercise of sound discretion and independent judgment in each case. *Southern Bell T. & T. Co. v. Mississippi Pub. Serv. Com'n.*, 237 Miss. 157, 113 So.2d 622 (1959).

5a. The chancery court's authority on review is limited by Mississippi Code Annotated section 77-3-67(4) (1972) to: The order shall not be set aside in whole or part except for errors of law, unless the court finds it is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of statutory authority or violates constitutional rights.

5b. *The authority of 5a has been construed at times as follows: The sole question presented for decision is whether or not the action of the commission was arbitrary, not supported by substantial evidence, or was manifestly against the evidence. Tri-State Transit Co. of La. v. Dixie Greyhound Lines, 197 Miss. 37, 19 So.2d 441 (1944).*²

With these principles in mind, we turn to the facts presented in the instant case.

MPC is a corporate public utility as defined in the Public Utility Act of 1956 as amended. It is incorporated under the laws of the State of Mississippi. All of MPC's common stock is owned by the Southern Company, an investor-owned public utility company, organized and existing by and through the laws of the State of Delaware. The Southern Company also owns the common stock of Georgia Power Company, Alabama Power Company and Gulf Power Company. These four operating companies of the Southern Company system are interconnected by a transmission grid and the generating facilities of the operating companies are operated as a fully integrated power system, which MPC contends has many advantages.

MPC is engaged in the generation, transmission, distribution and sale of electric energy to the public in 23 counties in southeast Mississippi. It serves 52 municipalities and 70 nonincorporated communities. MPC serves at wholesale all of the requirements above that are supplied by the Southern Company system, including one REA distributing cooperative and part of the requirements of two other such rural electric cooperatives.

In *Mississippi Power Co. v. Mississippi Public Service Comm'n.*, 291 So.2d 541 (Miss. 1974), we said:

The Court also cited with approval *Federal Power Commission v. Hope Natural Gas Company*, 320

² *Miss. Pub. Serv. Comm'n. v. Miss. Power Co.*, 337 So.2d 936, 938, 939 (Miss. 1976).

U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), and quoted from it as follows:

“The rate-making process under the Act, i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Co. case [Federal Power Commission v. Natural Gas Pipeline Co.] *that ‘regulation does not insure that the business shall produce net revenues.’* 315 U.S. 575 p. 590, 62 S.Ct. 736, 86 L.Ed. 1037. . . .

(291 So.2d at 556) (emphasis ours).

On October 20, 1980, MPC filed with the PSC a notice of change in rates to become effective on November 20, 1980. The proposed rate increase was designed to produce \$39,306,000 additional revenue. On November 10, 1980, MPC filed a refunding bond as provided by law, said bond was approved by the order of the commission, and the rates were placed into effect subject to refund on November 20, 1980. After hearings were held from time to time, they were finally concluded on April 16, 1981, and consisted of 16 volumes encompassing 2470 pages. The PSC made an extensive 30-page finding of facts and order that granted MPC a rate increase of \$10,877,000 even though it had allowed a rate increase to MPC on March 7, 1980, in the approximate amount of \$17,000,000. In so doing, the PSC made some nine adjustments to the company’s rate base, two adjustments to the company’s estimated expenses shown on the operating statement and allowed a rate of return of 9.76%.

MPC appealed to the chancery court and the learned chancellor reversed the PSC as to the disallowance of \$19,000,000 attributed to the Plant Daniel transaction, holding that nowhere in the findings did the commission set forth any explanation as to how it arrived at the \$19,000,000 figure except that this was one-half of the \$38,000,000 increase as shown by MPC. The learned

chancellor found that the commission's order reducing by one-half the \$38,000,000 figure was an abuse of discretion by the commission and was not supported by the evidence. Portions of the 30-page order and findings of fact with reference to Plant Daniel are as follows:

The four operating companies of The Southern Company System are interconnected by a transmission grid and the generating facilities of the operating companies are operated as a fully integrated power system. The Company contends that this has many advantages.

Although this integrated system of ownership and operation of generating facilities is not a direct issue in this case, it is a matter of continuing and growing importance to this Commission as it bears directly on the Company's rate base and capital costs which must be supported by Mississippi customers. In this connection, the Commission takes note of the fact that the Jackson County Steam Plant unit no. 2 (hereinafter referred to as Plant Daniel unit no. 2) is scheduled for commercial production in 1981 and that its addition to the System contributes significantly to the Company's rate increase request in this case.

Pursuant to the Commission's Order of August 27, 1976 in Docket U-3168, the Company sold a one-half undivided interest as tenant in common in its Plant Daniel to Gulf Power, an affiliated member of The Southern Company System. This transaction was proposed due to the Company's earlier overestimate of its own generation capacity requirements and Gulf's apparent need for more capacity at a time when Plant Daniel was under construction. The Commission approved the proposed sale based on the Company's representation that it would be in the best economic interest of both the Company and its

customers and that it would thus serve the public interest.

The Commission's Order in Docket U-3168 stated that after Plant Daniel unit no. 2 was completed, necessary adjustments would be made so that each party would have a 50% ownership interest in both units and the common facilities, but appropriate rate treatment with respect to the sale was not specified at that time.

In this case the Company's proposed ratemaking treatment with respect to the completion of Plant Daniel unit no. 2 reflects an exchange of ownership between the Company and Gulf Power pursuant to the Commission's approval in 1976 under which the Company will relinquish a half interest in Plant Daniel unit no. 1 for a half interest in unit no. 2. Since unit no. 1 was completed about four years earlier than unit no. 2, unit no. 2 is more costly and the exchange results in a substantial increase in the Company's proposed rate base without any addition of capacity.

While the Company projected in 1977 that the cost of this exchange with Gulf Power would ultimately amount to \$16 million, the amount actually proposed as a gross plant addition in this case is \$38 million. The staff witnesses who addressed this matter recommended that the cost-over-run should be considered in arriving at the allowed rate of return in this case. In addition, the staff witnesses recommended that the Plant Daniel unit no. 2 coal stocks should be excluded from the Company's rate base in this case, and that increased rail car costs should also be excluded. On May 13, 1977 in an Order in Docket U-3245, this Commission permitted the Company to purchase 230 coal cars at a cost of \$35,000 each to serve Plant Daniel. The Company's proposed

rate treatment here is to, in effect, exchange half of those cars with Gulf for corresponding cars costing \$44,900 each, thus producing a rate base addition of \$1,138,500. The Company's rate base shall be reduced accordingly.

This Commission must, at this time, give careful consideration to this subject and its effect on the overall cost of energy to the Company's customers.

Further, the Commission takes notice of the evidence introduced by the Company regarding its generation plant investment and operating costs. For many years now the Commission has continuously monitored revenue and audited the Company's fuel costs for generation of electricity. Monthly, quarterly, and annual reports are received from the Company and independent auditors employed by the Commission. The growing concern over rising generation costs require that this Commission carefully study, investigate and give careful consideration in appropriate hearings to all plans and efforts by the Company which contribute to these costs so that the Commission is able to assure that the resulting effect will be the lowest, ultimate cost of electric energy to Mississippi customers, both now and in the future. In this regard, the Commission takes note of the fact that the Company's last rate increase was effective October 10, 1979, pursuant to this Commission's Order of March 7, 1980 in Docket No. U-3739 and was projected to yield increased revenues of \$16,805,000 annually. The filing of this case within a matter of months after that Order seeking an additional \$39.3 million in annual rate increases is virtually unprecedented in this jurisdiction and serves to clearly illustrate the urgent need for particularly careful regulatory scrutiny of the Company's alleged revenue deficiency in this case.

The result of this Order, as hereinafter set out, is to find and order that the proposed new schedule of rates and charges filed by the Company on October 20, 1980, are unjust, unreasonable, and unlawful and shall not be allowed or approved. The proposed new rates result in an increase in revenues to the Company which is excessive and further result in an unfair and unjust burden on the Company's customers. Consistent with this result, however, the Commission is compelled to acknowledge certain current economic realities which must be considered in reaching a decision in this cause which will be supported by substantial evidence.

To ignore the evidence regarding the impact of inflation and general economic conditions on the Company's cost of providing electric service to its customers would constitute an error of law and disregard for the express terms of the Act. However much this Commission may be aware of the burden and hardship placed on the public by any increase in the cost of electric service, it cannot avoid the responsibilities placed on it by the Act and render decisions which will be upheld as consistent therewith. To do otherwise could result in consequences having greater adverse effects on the public.

The Company failed to meet the burden of proof necessary to justify the increase in revenues produced by the proposed new schedule of rates and charges; however, there remains sufficient evidence, which a court would recognize, to support the additional revenues which the Company is allowed an opportunity to earn as a result of this Order.

• • • •

One additional adjustment that the Commission feels is required is to eliminate the rate base effect of the excess cost of Plant Daniel unit no. 2. It is

unthinkable to ask the Mississippi ratepayers to shoulder this additional burden. It seems obvious that any such cost increases should be borne by the ratepayers of Gulf Power Company. Although it is true that this Commission relied on the Company's projections and estimates and allowed the Company to sell a one-half undivided interest in the Daniel Plant to Gulf Power Company, there was never a determination made that the proposed sale would impact Mississippi ratepayers to the extent that the Company now proposes. The Company's plant accounts will increase by an estimated \$38,000,000 when Plant Daniel unit no. 2 goes into commercial operation (currently estimated at May 31, 1981). The Company has not demonstrated to the satisfaction of this Commission that the ownership of a one-half undivided interest in both Plant Daniel units as opposed to the present ownership of only unit No. 1 will be any more beneficial to Mississippi ratepayers. The Company's proposal is unsupported in the record and not in the best interest of Mississippi ratepayers. . . .

The PSC with its expertise is the trier of facts and within such province has the right to determine weight of evidence, reliability of estimates and credibility of witnesses, in passing on new rates. *Mississippi Public Service Comm'n. v. Mississippi Power Co.*, 337 So.2d 936 (Miss. 1976) ; *Southern Bell Tel. & Tel. Co. v. Mississippi Public Service Comm'n.*, 237 Miss. 157, 113 So.2d 622 (1959).

The standard of review of an appeal from the PSC's order is proscribed in Mississippi Code Annotated section 77-3-67(4) (Supp. 1982) which provides as follows:

(4) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may

be. In case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

On appeal, such findings are presumptively valid and an appellate court cannot substitute its judgment for that of the commission provided substantial *evidence exists to support its findings* or its findings are not manifestly against the weight of the evidence. *Mississippi Public Service Comm'n. v. Mississippi Valley Gas Co.*, 327 So.2d 296 (Miss. 1976); *Loden v. Mississippi Public Service Comm'n.*, 279 So.2d 636 (Miss. 1973); *Citizens of Stringer v. G M & O RR*, 229 Miss. 1, 90 So.2d 25 (1956); and *Cobb Bros. Constr. Co. v. Gulf, M & O R. Co.*, 213 Miss. 706, 57 So.2d 570 (1952).

The finding of the commission is supported in the record by the testimony of Dr. J. W. Wilson, staff witness of the Public Service Commission, a part of which is as follows:

Q. Were the financial details of the proposed transaction specified and approved in the commission's 1976 order?

A. No; the Order simply stated that after Unit 2 was completed "the necessary adjustments" would be made so that each party would have a 50% ownership interest in both units and the common facilities. No financial details as to "the necessary adjustments" were specified. It is clear however that the Commission did contemplate that the transaction,

as ultimately consummated, would be economically beneficial to all concerned and would thus serve the public interest.

Q. Are the specific financial details, as proposed by MPCo for ratemaking treatment in this case, consistent with the commission's 1976 determination that the transaction be in the best economic interest of both the company and its customers?

A. *That is questionable.* The end result of the Company's proposed ratemaking treatment here is to substantially increase the financial burden of Mississippi consumers without giving them one more kilowatt of electricity. This result occurs because upon completion of Unit 2 at the Jackson County Steam Plant (which has been owned and financed by Gulf pursuant to the Commission's approval in 1976) MPCo will, in effect, trade Gulf a half interest in its own Unit 1 for a half interest in Unit 2. Of course, since Unit 1 was completed about four years earlier than Unit 2, Unit 2 is more costly and thus the trade results in a substantial increase in the cost of MPCo's rate base without any addition of capacity.

Q. Is the excess cost of Unit 2 over Unit 1 more than was contemplated at the time the commission approved the transaction?

A. Yes. While the Company reported in 1977 that the cost of MPCo would ultimately amount to \$16 million, the amount actually proposed as a rate base addition in this case is \$38 million. While the Commission may determine that an appropriate rate base adjustment is warranted in this regard, I believe that, *at a minimum*, this cost-overrun should be considered in arriving at the allowed rate of return in this case, and that such consideration warrants a return allowance *at the bottom* of the applicable range.

In retrospect, the arrangement proposed with respect to Unit 2 of the Jackson County plant, appears to be a far better deal for others in The Southern Company than for MPCo. It's as if I had purchased two adjacent lots some time ago, expecting to construct a very large home; then decided to build a smaller one; sold the extra lot to a relative who, several years later, built an identical home and upon its completion pooled his interests with mine so as to share equally the costs of the two undertakings. If my home cost \$40,000 and was financed at 8% but his identical home, built several years later, cost \$60,000 and was financed at 12%, the redivision of costs on an equal basis leaves me worse off financially than I was before. Presuming that we had agreed in advance to pool our interests upon the completion of his home and subsequently to make "the necessary adjustments" in "the best economic interest" of us both, it would seem that my fair share of the joint costs should be less than half. This is particularly so if I originally sold the extra lot at my original cost even though building site costs had escalated since its original acquisition and if I had done all the work in obtaining building permits and zoning ordinances. However, to share my original cost of common facilities such as the water main and access road, equally and without markup, would be a further gratuity to my relative, as would a charge equal to the original cost of certain necessary landscaping improvements on the second lot even though landscaping costs had subsequently skyrocketed. *Clearly then, at the time we pool our assets, "the necessary adjustments" to serve our mutual "best economic interest" should not be a 50/50 total cost split. Yet this is essentially the ratemaking arrangement which MPCo proposes in this case as a result of the Jackson County transaction with Gulf Power, its sister company even though the Unit 2 cost excess is more than double the amount that had been anticipated.*

Q. Are there certain aspects of the Jackson County Unit 2 arrangement where cost disallowances are clearly called for?

A. Yes. As my associate, Mr. Clark, has pointed out, the cost of Unit 2 coal stocks should be excluded from MPCo's rate base in this case. In addition, increased rail car costs should also be excluded. On May 13, 1977 in its order in Docket U-3245, this Commission permitted MPCo to purchase 230 coal cars at a cost of \$35,000 each to serve the Jackson County Plant. Now the Company proposes, in effect, to exchange half of those cars with Gulf for corresponding cars costing \$44,900 each. This unwarranted rate base addition of \$1,138,500 should be disallowed. The computation of this disallowance is shown in Exhibit — (J.W.-15)."

On review of the record consisting of the testimony of many experts for both the PSC and MPC and the detailed finding of facts made in the commission's order, we find that the chancery court erred in reversing the PSC's order which reduced MPC's proposed inclusion of \$19,000,000 plus \$1,138,500 in the overall rate base as to the Plant Daniel transaction. In view of the foregoing, the chancery court decree reversing the PSC's order as to the Plant Daniel transaction is reversed.

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,059

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

v.

MISSISSIPPI POWER COMPANY

BROOM, PRESIDING JUDGE, DISSENTING AS TO
PART I:

Having authored the entire majority opinion except the ten pages comprising *PART I*, I am not able to concur as to *PART I*. With all due deference to the views expressed by the majority of my colleagues on the question of the Plant Daniel transaction, I feel constrained to respectfully express by dissent from those views set forth in *PART I*.

A close and careful scrutiny of both the reasoning and the result expressed in the majority view of the treatment of the Plant Daniel transaction clearly reveals a misconception of the basic function of the PSC's role as the interface between the public as consumers and the utilities as suppliers. As very recently observed in *State of Mississippi, et al., v. Mississippi Public Service Commission*, (No. 53,709, decided March 9, 1983, not yet reported):

Mississippi Code Annotated § 77-3-39 (1972), authorizes the Commission to establish rates that are just and reasonable to the ratepayers and which will yield a fair rate of return to the utility for its services. In effect the Commission is the counterpart of the market place by which other businesses are measured. This is so because public utilities are monopolies engaged in the business of furnishing necessary services to the public. Obviously, the legislative intent in creating the Public Service Com-

mission was to interpose an authoritative body between the ratepayers of the utility and the investors in the utility so that their respective interests, necessarily antagonistic, might be equitably served.

Succinctly summarized in that opinion are the goals and policy considerations behind the regulation of public utilities:

The crucible of the competitive public market place to which business concerns, other than monopolies, are necessarily exposed is thus avoided so that economic waste by overlapping and duplicating services will not occur.

The "crucible of the competitive public market place" in a freely competitive arena is without question the best overall method for assuring the maximum efficient production of a product at the lowest possible price. This maximum degree of efficiency is achieved by "squeezing out" the less efficient producers and the poorer potential consumers. Such "squeezing out" is accomplished very simply: They go out of business.

The economic "natural selection" or "survival of the fittest" which is experienced in the free and open competitive market, is not without its attendant social and economic costs: (1) economic and social dislocations which result from the failure of the less efficient producers to survive; and (2) duplication of effort and the attendant waste resulting from overlapping use of limited resources.

In the case of public utilities, these attendant social and economic costs have been weighed against the potential result of free and open competition with respect to the supplying of such utility's services and have been determined by state legislatures and the United States Congress to be unacceptable. When public utilities are involved, the dislocations resulting from the "crucible of the competitive public market place" can be disastrous. Visions come to mind of the social and economic chaos

which would result from competition causing an electric company to go out of business in the dead of winter. Likewise, the combination of utilities' capital-intensive nature along with the economies of scale underlines the potentially enormous waste possible if two competing electric utilities were to build two competing facilities when only one such facility would be required to adequately serve the public's needs.

At the other end of the scale is the "pure" monopoly whose great potential for the abuse of economic power, and whose unremitting history of inefficiency have resulted in the determination that such a means of providing basic public services is also totally unacceptable.

The compromise which has been sought for the provision of basic public services has been that of the "regulated utility" which in essence grants a monopoly over the provision of services but which subjects the company providing those services to public oversight and control. Such regulated utilities are not normal monopolies with their comparative free hand in the market place¹ but rather exist as regulated monopolies with the function of such regulation being to take an overview of both the public needs and the utilities' capabilities so as to closely correlate supply and demand, and thereby provide such services as efficiently as possible. This is the function of the Public Service Commission.

How this regulation is to be accomplished is a never-ending issue. What tools has the PSC for matching up market place needs and utility capabilities as efficiently as possible? This regulation is accomplished in two ways:

The first of these is that the PSC controls the growth of utility facilities through the issuance of a certificate of public convenience and necessity. This authority de-

¹ Of course, the extent to which such a "free hand" may in fact be exercised depends upon the relative elasticity of the demand in that market place.

volves upon the PSC by virtue of Mississippi Code Annotated § 77-3-11 (1972) :

§ 77-3-11. Certificate of public convenience and necessity required.

(1) No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing . . . electricity, . . . for any intrastate sale to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subparagraph (3) of paragraph (d) of section 77-3-3, *without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.* (Emphasis added).

In *Mississippi Power & Light Company v. Blake*, 236 Miss. 207, 109 So.2d 657 (1959), this Court commented upon the meaning of the predecessor to the above cited statute:

In view of the above language, this Court in *Mississippi Power & Light Company v. Town of Coldwater*, 106 So.2d 375 (Miss.) said that the trial court erred in holding that it was not necessary for the co-operative there involved, before making a construction or extension of its facilities at an expense of more than \$35,000, to obtain from the Public Service Commission a certificate of public convenience and necessity. *In other words, the statute meant what it said.* (Emphasis added).

236 Miss. at 218-19, 109 So.2d at 661.

We went on to note:

The action of the Commission, in granting a certificate, cannot be overturned if it is supported by substantial evidence, and is not arbitrary or capri-

cious, or beyond its power to make, and does not violate some constitutional right.

Id., at 219, 109 So.2d 661.

In other words, through the issuance (or refusal to issue) of a certificate of convenience and public necessity the PSC exerts a degree of control upon certain of the assets which will be includable in the utility's rate base. See Mississippi Code Annotated § 77-3-43 (1972). This function is consistent with the policy of preventing waste and duplication of both facilities and efforts. *Capitol Electric Power Association v. Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 730 (1961).

The PSC's issuance of such a certificate must be based upon substantial evidence that the public necessity requires the existence of such a proposed facility. Like any other procedure before the PSC, the burden of proof to establish such public convenience and necessity is upon the utility and, like any other proceeding before the PSC, *the PSC's order is presumed to be correct*. It seems abundantly clear that such a determination by the PSC that the public convenience and necessity require the construction of additional facilities includes *ipso facto* the PSC's conclusion that such addition will be both used and useful in the generation of electricity. Under Mississippi Code Annotated § 77-3-33(1) (1972), the legislature has specifically provided that a utility is entitled to a fair rate of return "upon the reasonable value of the property of the utility *used or useful in furnishing service*." (Emphasis added).

The second method by which the PSC regulates public utilities is through the regulation of the rate of return a utility is allowed to earn upon such property which is used or useful in the provision of service. After determining what property is used or useful in providing service, the PSC is empowered to determine what constitutes a fair rate of return on that rate base, or, in other

words, to determine that to which the investors are entitled as a fair return for the public's use of their property in the generation of electricity. With this basic analysis of the function of the PSC in mind, it is appropriate to turn to a slightly more detailed examination of the factual situation surrounding the Plant Daniel transaction than is set forth in the majority opinion. Events surrounding the Plant Daniel transaction between MPC and Gulf Power are set out in the rebuttal testimony of H. H. Bell, MPC's vice president in charge of engineering and operation.

In October of 1970, a decision was made to build Plant Daniel in Jackson County. This decision was based upon studies indicating that MPC's production requirements were going to be growing to the extent that by 1976 the utility would have a production deficiency of approximately 500 megawatts. *These figures and the original plans for Plant Daniel were submitted to PSC, and approved*, and a certificate of public convenience and necessity issued. Plant Daniel was originally conceived as fueled by low sulphur coal, but with the promulgation of the Clean Air Act in 1972 and certain logistical problems concerning dredging the river for coal barges, the decision was made to have the plant fueled by low sulphur oil.

In 1973, based upon projections showing a further increase in the demand for electricity, plans for a second unit at Plant Daniel were announced. *Once again the plans were submitted to PSC and approved*. In 1973, the Arab oil boycott and the subsequent unreliability of a steady oil supply necessitated the decision to modify the plans for both units back to coal. This decision was made early in 1974, and an updated construction budget showed an increased cost of approximately \$44,000,000.

In 1974, MPC postponed the completion date of Unit 1 from 1976 until 1977, (and unit 2 from 1978 until

1979), as a result of difficulties MPC was encountering in obtaining financing for unit 1. This was caused by declining earnings which resulted from the inability to sell a sufficient amount of long-term securities in order to finance this construction.

When construction was resumed on unit 1, MPC announced that it was entering into negotiations with Gulf Power Company on a plan for joint ownership of the entire Plant Daniel facility. Under terms of the agreement which was finally reached between MPC and Gulf Power, Gulf Power was to take over the financial obligation to complete unit 2. Likewise, Gulf Power was to pay MPC $\frac{1}{2}$ of the amounts already spent by MPC in the construction of certain common facilities to be utilized by both units of the Plant Daniel facility. Upon completion of both units, MPC and Gulf Power were to "adjust their accounts" so as to reflect that each company owned a $\frac{1}{2}$ undivided interest in the entire Plant Daniel facility (as opposed to each company owning an individual unit and sharing the common facilities). Pursuant to Mississippi Code Annotated § 77-3-11 (1972), this plan was presented to PSC along with the results of studies showing a marked decrease in the projected growth rate of electricity demand, and the entire agreement was approved by PSC. *Mississippi Power & Light Co. v. Blake*, 236 Miss. 207, 109 So.2d 657 (1959); *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 615, 106 So.2d 375 (1958). No ceiling was placed on costs relating to the facility, and PSC's excluding the Plant Daniel costs, after having first approved the construction, runs capriciously against the grain of its official act granting the Certificate of Public Convenience and Necessity as per the applicable statute, § 77-3-11, *supra*. As a part of this agreement, the completion date for unit 2 was postponed from 1978 to 1980. After MPC and Gulf Power entered into the above described agreement, Gulf Power deferred this completion date one additional year until 1981.

As a result of the time delays and other various cost overruns, the final cost of Unit 2 exceeded the final cost of Unit 1. Therefore, part of the "adjusting of accounts" between MPC and Gulf Power necessitated the payment of approximately \$40,000,000 (\$38,000,000: plant; \$2,300,000: coal cars) in order for the accounts to reflect an undivided $\frac{1}{2}$ ownership in the entire Plant Daniel by each company. PSC contends that a portion of this amount should not be includable in the rate base for essentially two reasons: (1) the entire transaction did not result in any increase in electricity producing capacity of MPC²; and (2) MPC's customers should not be required to bear the burden of cost overrun attributable to the inefficient management of both MPC and of Gulf Power.

MPC contends that the chancellor's decision in overruling that portion of the PSC order which deducted approximately \$20,000,000 associated with the Plant Daniel transaction from the rate base was correct. MPC points to the chancellor's rationale in overruling that portion of the PSC order: (1) no evidence was presented by any staff witness recommending such a reduction in the rate base, (2) no explanation or evidence was given for the choice of the amount by which the rate base was reduced, and (3) there was no proof that the decision to sell Gulf Power a $\frac{1}{2}$ undivided interest in Plant Daniel under the terms of their agreement was unreasonable or irresponsible.

² Each unit of the Plant Daniel facility has a 500 megawatt capacity. Hence PSC contends that if MPC had merely not built unit 2 they could have avoided the \$38,000,000 in cost overruns attributable to their $\frac{1}{2}$ interest and would still have 500 megawatt generating capacity which they presently have from Plant Daniel. What both the PSC and the majority fail to grasp is that the "adjustment" has nothing to do with generating capacity, but has only to do with calculation of, and payment for each company's one-half interest in a generating plant which increased the capacity of both companies.

Testimony by MPC indicated that the transaction between MPC and Gulf Power had been based upon the sound business decision that selling a $\frac{1}{2}$ interest in the entire Plant Daniel facility was superior to the idea of either selling one unit to Gulf Power or canceling construction completely. Canceling plans for Unit 2 would have been prohibitively expensive. Unrefuted testimony showed that MPC's decision to sell a $\frac{1}{2}$ interest to Gulf Power, as approved by the PSC, *saved \$55,000,000 over any other alternative available in 1976 when the decision was made.*

PSC's staff witness Mr. John Wilson testified that the addition of Unit 2 of the Plant Daniel facility would result in no increase in electric generating capacity to MPC. It is important to note that the staff's recommended reduction in the rate base *does not include any recommended reduction* in MPC's proposed rate base as a result of the Plant Daniel transaction (other than the reduction based upon the purchase of the railroad coal cars).

Q. Have you reviewed the Company's proposed test-year adjustment to account for the increased costs of Unit 2 of the Jackson County Plant?

A. Yes. Pursuant to the Commission's Order of August 27, 1976, in Docket U-3168, MPCo sold a one-half undivided interest as tenant in common in its Jackson County steam plant to Gulf Power, an affiliated member of The Southern Company system. This transaction was proposed due to MPCo's earlier overestimate of its own generation capacity requirements and Gulf's corresponding need for more capacity at a time when MPCo's Jackson County plant was under construction. *The Commission approved the proposed sale based on the brief that it would be in the best economic interest of both the Company and its customers.* (Emphasis added).

At this juncture it should be noted that the evidence clearly showed that MPC saved \$55,000,000 over any other alternative available in 1976 when the PSC approved the Plant Daniel transaction. Hence its belief was well founded and certainly there was *no* proof in the present proceedings as to *any* alternative in 1976 that would have been better.

PSC staff witness Mr. Wilson continued:

Q. Were the financial details of the proposed transaction specified and approved in the Commission's 1976 order?

A. No; the Order simply stated that after Unit 2 was completed "the necessary adjustments" would be made so that each party would have a 50% ownership interest in both units and the common facilities. No financial details as to "the necessary adjustments" were specified. It is clear however that the Commission did contemplate that the transaction, as ultimately consummated, would be economically beneficial to all concerned and would thus serve the public interest.

Clearly, *all* the evidence showed that the transaction approved by the PSC in 1976 *was* economically beneficial to all concerned. Continuing with the testimony:

Q. Are the specific financial details, as proposed by MPCo for ratemaking treatment in this case, consistent with the Commission's 1976 determination that the transaction be in the best economic interest of both the company and its customers?

A. That is questionable. The end result of the Company's proposed ratemaking treatment here is to substantially increase the financial burden of Mississippi consumers without giving them one more kilowatt of electricity. This result occurs because upon completion of Unit 2 at the Jackson County Steam Plant (which has been owned and financed by

Gulf pursuant to the Commission's approval in 1976) MPCo will, in effect, trade Gulf a half interest in its own Unit 1 for a half interest in Unit 2. Of course, since Unit 1 was completed about four years earlier than Unit 2, Unit 2 is more costly and thus the trade results in a substantial increase in the cost of MPCo's rate base without any addition of capacity.

Mr. Wilson failed to address *the* vital question: "What would have been the effect on the rate base had MPC not proposed the transaction?" Unrefuted, unconflicting testimony shows that that cost of rate base would have been increased by an *additional* \$55,000,000.

Mr. Wilson testified further:

Q. Is the excess cost of Unit 2 over Unit 1 more than was contemplated at the time the Commission approved the transaction?

A. Yes. While the Company reported in 1977 that the cost to MPCo would ultimately amount to \$16 million, the amount actually proposed as a rate base addition in this case is \$38 million. While the Commission may determine that an appropriate rate base adjustment is warranted in this regard, I believe that, at a minimum, this cost-overrun should be considered in arriving at the allowed rate of return in this case, and that such consideration warrants a return allowance at the bottom of the applicable range.

In retrospect, the arrangement proposed with respect to Unit 2 of the Jackson County plant, appears to be a far better deal for others in The Southern Company than for MPCo.

Interestingly enough, the figures which Mr. Wilson quotes are from 1977, while the order approving the Plant Daniel was in 1976. He did not address himself to the question of whether a specific dollar figure was ever within the contemplation of the PSC at the time of

the approval of the transaction. Most significant are Mr. Wilson's prefatory words to this latter comment—"In retrospect . . ." The use of *retrospect* in evaluating the results clearly precludes the existence of any "mismanagement" because the concept of "management" necessarily involves application of data in a prospective manner.

Finally, Mr. Wilson noted:

Q. Are there certain aspects of the Jackson County Unit 2 arrangements where cost disallowances are clearly called for?

A. Yes. As my associate, Mr. Clark, has pointed out, the cost of Unit 2 coal stocks should be excluded from MPCo's rate base in this case. In addition, increased rail car costs should also be excluded. On May 13, 1977 in its order in Docket U-3245, this Commission permitted MPCo to purchase 230 coal cars at a cost of \$35,000 each to serve the Jackson County Plant. Now the Company proposes, in effect, to exchange half of those cars with Gulf for corresponding cars costing \$44,900 each. This unwarranted rate base addition of \$1,138,500 should be disallowed. The computation of this disallowance is shown in [this] Exhibit.

This testimony is the *only* testimony suggesting *specific* reductions from the rate base. As can be seen above, the only other recommendation Mr. Wilson made was that the *rate of return* (not the rate base) be the lowest in the acceptable range. Of course, since it is evident that Mr. Wilson has given no evidence of mismanagement, even this recommendation is without evidentiary basis.

Other staff witnesses admitted that the only way of determining the fact that Plant Daniel Unit 2 was not necessary was by virtue of "20-20 hindsight."

A. Obviously in my opinion, with 20-20 hindsight, it was not necessary to build Plant Daniel 2.

Otherwise the company would not have sold half of 1 and 2. . . .

. . . .

Q. Mr. Clark, when you said looking at Plant Daniel with 20-20 hindsight, you're not criticizing the decision that the Mississippi Power Company made to construct Plant Daniel at the time it was made, are you?

BY THE WITNESS:

A. I was not involved in that decision making process or involved as a witness or in any other way involved at that time. This Commission certified the building of Plant Daniel Unit number 2, and at that time I assume that the company's position was that it was necessary.

Q. This Commission approved both the Daniel 1 and Daniel 2 units.

A. I assume they did. I haven't seen the Daniel 1 Order, but I understand that they do have to certify that construction.

There was no testimony by the staff that MPC's Plant Daniel decisions or actions were the result of poor management decisions when viewed from the context in which those decisions were made. The worst thing stated by any staff witness as to the financial details of Plant Daniel was that it was "questionable" based upon "20-20 hindsight." Neither was there any indication that those decisions were made in bad faith, fraudulent, or solely calculated to raise the rates charged the customers. Incredibly, testimony was given by the *PSC staff* that the transaction as proposed had been approved by PSC *based upon a belief that the best economic interest of the customers and MPC required the transaction*. Now the facts have indeed born out this belief, to the extent of \$55,000,000, yet the majority deems it necessary to "pun-

ish" MPC for complying with the PSC's regulatory actions with respect to the effect of the Plant Daniel transaction.

In view of the fact that the PSC's function is *regulatory* in nature, such a retributive attitude would seem far more indicative of the PSC's failure to properly ascertain whether or not a utility's burden of proof had been met when that utility was seeking a certificate of public convenience and necessity. It is certainly an inappropriate response to the alleged "fault" of the utility for some type of amorphous "mismanagement" discernable only when that utility's actions are subjected to post-mortem dissection in the light of 20-20 hindsight. Such a position both on the part of the PSC and on the part of the majority bears an ominous resemblance to the reactionary type parent who after giving permission to a young boy to go out and play in the rain proceeds to beat him unmercifully upon his return because the boy got wet.

The majority opinion in PART I comments that utility rate proceedings are never final. While generally it is true that ratemaking is an on-going process, such is not true in the instant case. The effect of the PSC's decision as upheld by the majority of this Court today is to exclude a certain portion of the cost of Plant Daniel from MPC's rate base. In other words, PSC and this Court have said that a certain portion of MPC's expenditures on Plant Daniel may not ever be included in those assets upon which MPC is entitled to receive a fair rate of return. It would seem clear that this is a final determination and, barring a change in the statutory provisions, such determination would be *res judicata* on the question of this portion of the Plant Daniel expenditures. See *City of Jackson v. Holliday*, 246 Miss. 412, 149 So.2d 526 (1963), wherein we stated:

The common law doctrine of *res judicata*, including the subsidiary one of collateral estoppel, is de-

signed to prevent relitigation by the same parties of the same claims or issues. The reasons behind the doctrine, as developed in the courts, are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. The doctrine is best applied to an adjudication of past facts. . . .

....

A judgment bars a subsequent application for the same purpose where the facts upon which it is based are not changed and the conditions are substantially similar.

246 Miss. at 419-20, 149 So.2d at 527-28.

Under today's ruling by the majority, MPC will never be able to earn any rate of return whatsoever on property which the PSC had previously determined to be necessary for the convenience of the public, and therefore to be used and useful in the generation of electricity. It is important to understand that the effect of today's decision by the majority is not to directly reduce the *rates* requested by MPC by \$19,000,000, but rather to reduce the valuation of the assets upon which MPC is entitled to a fair rate of return.

PART I of the majority opinion sets forth some principles and tenets of review which guide this Court in the appellate review of ratemaking proceeding. With deference I must respectfully take issue with 5b. in that list as an interpretation or construction of 5a. 5a as set forth in the majority opinion states:

5a. The chancery court's *authority* on review is limited by Mississippi Annotated section 77-3-67 (4) (1972) to: The order shall not be set aside in whole or part except for errors of law, unless the court finds it is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of statutory authority or violates constitutional rights.

5b. on the other hand would seem to indicate that the sole question presented to this Court in appellate review of a ratemaking procedure before the PSC which has been appealed to the chancery court and then finally to this Court is whether the evidence supported the PSC's decision:

5b. The authority of 5a has been construed at times as follows: The sole question presented for decision is whether or not the action of the commission was arbitrary, not supported by substantial evidence, or was manifestly against the evidence. Tri-State Transit Co. of La. v. Dixie Greyhound Lines, 197 Miss. 37, 19 So.2d 441 (1944).

This constitutes somewhat of an over-simplification of the five specific areas which are opened to our consideration in reviewing the PSC's action. These five areas are: (1) errors of law; (2) that the PSC's decision is not supported by substantial evidence; (3) that the PSC's decision is contrary to the manifest weight of the evidence; (4) that the PSC's decision is in excess of its statutorily granted authority; and (5) that the PSC's decision violates constitutional rights.

The standard of review which this Court is bound to observe in appellate review of a ratemaking case is not merely to cursorily examine the PSC's order to determine whether they have uttered a sufficient number of "magic words." Rather we are required to examine any such order to see if it passes muster as to the five aspects listed above.

We are not triers of fact. We are not intended to be "experts" in the highly technical intricacies involved in a ratemaking proceeding. But neither are we blind. This Court has consistently stated that when the PSC's decision does not violate a constitutional right and when that decision is not in excess of the statutory authority, then it will be upheld on appeal if it is supported by substan-

tial evidence and it is not contrary to the manifest weight of the evidence. With this tenet of appellate review in mind, we have required the PSC when appealing from a chancellor's decision in overturning its order merely to point to that evidence which it deems to be the substantial evidence supporting its decision. *Mississippi Public Service Commission v. Mississippi Power Company*, 366 So.2d 656 (Miss. 1979); *Mississippi Public Service Commission v. Mississippi Valley Gas Company*, 327 So.2d 296 (Miss. 1976). This is not requiring the PSC to shoulder an additional burden of proof but is merely a procedural requirement that it tell this Court what the PSC considers to be substantial evidence. In view of the fact that utility cases typically consist of several thousand pages of testimony, requiring the PSC to point to what it considers to be substantial evidence is eminently reasonable particularly in view of their highly specialized expertise, and our lack of such.

In the instant case, the wisdom of that requirement is highlighted. The PSC did not point to *any* evidence of *any* of the following:

First, the PSC did not point to any evidence in the record of what the reasonable value of MPC's undivided $\frac{1}{2}$ interest in Plant Daniel was. The only piece of evidence in the entire record which would tend to vaguely illuminate such a question is Mr. Wilson's testimony that if the decision to build Unit 2 had never been made, Unit 1 would now be cheaper. This type of subjunctive reasoning is vaguely reminiscent of the farmer who observed that "*If the cow gave buttermilk, we wouldn't have to churn.*"

Second, the PSC has failed to point to any evidence of mismanagement by MPC. The only criticisms appearing in the record are qualified by both witnesses as being possible only by virtue of hindsight. There has been no evidence tending to show the invalidity of the PSC's

1976 order. The majority opinion goes to great lengths to point out that any order issued by the PSC is presumptively correct. Surely MPC is likewise entitled to rely upon such a presumption of correctness of its certificate of public convenience and necessity issued by PSC. The PSC may indeed have been lax in determining whether Unit 2 of Plant Daniel was necessary. If so, the fault lies with the PSC, not with MPC. Seeking to punish MPC for the regulatory failure of the PSC can only inure to the long-term detriment of electric subscribers in this state.

Thirdly, the PSC did not point to any evidence of any option or alternative which was available to MPC in 1976 which would have had better results. It seems totally incredible for MPC to have gone to the PSC with a plan for remedying a bad situation, have the PSC approve such plan at every stage, and then when MPC seeks to include such expenditures in its rate base for the PSC to pull the rug out from under it. This is particularly incredible when the proof shows that MPC and its customers are \$55,000,000 better off than they would have been with any other alternative.

Fourthly, there is no testimony in the record that any specific amount should be excluded from the rate base other than the fuel stocks (which were excluded by the chancellor and affirmed by the majority) and the additional expenditure for coal cars. Quoted and accepted with approval by the majority is testimony that MPC should not be allowed credit in its rate base for 230 coal cars in which Gulf exchanged a $\frac{1}{2}$ interest to MPC at \$44,900 each. Basis of this thesis is the evidence that PSC "permitted MPCo to purchase 230" at \$35,000 each and therefore should not allow for the cost of any cars at \$44,900. What the majority seemingly fails to comprehend are the following facts concerning these cars:

The evidence clearly shows that there was a total of 460 coal cars purchased. The 230 cars which the PSC allowed to be purchased at \$35,000 each were purchased

at that price by MPC for supplying coal to Unit 1. When Unit 2 was being readied for operation 4 years later, *Gulf Power* purchased the *additional* 230 cars at \$44,900, the then-current price. The 460 coal cars are used in common by *both* Units. Because the second 230 coal cars were purchased by Gulf Power to provide sufficient coal for Unit 2, the purchase of *those* cars is not controlled by the order allowing the purchase of the first 230 cars. It is instead controlled by the 1976 PSC order approving the entire Plant Daniel transaction whereby Gulf Power assumed the financial obligations for Unit 2 and then MPC and Gulf Power were to adjust their accounts to reflect equal ownership. This they have done without any fraud and in exact compliance with the PSC's order.

For the PSC to exclude the Plant Daniel expenditure from the rate base *in contravention of its prior order* without any substantial evidence upon which to base such an exclusion clearly and unequivocally constitutes arbitrary and capricious action. The reason the PSC has failed to point to evidence of any of those four things is because the evidence is not there.

Today's decision in disallowing the inclusion in the rate base of amounts resulting from a transaction which was specifically authorized by the PSC conflicts with very appropriate language which may possibly have been overlooked: "[N]or shall any state deprive any person of life, liberty or property without due process of law;" United States Constitution, Amendment XIV; *see* *Blue Field Water Works v. PSC of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1922), and *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 529, 88 L.Ed. 333, 64 S.Ct. 281 (1944). *See also*, Mississippi Constitution of 1890, Art. 3, § 14.

For the reasons outlined above, I respectfully dissent.

HAWKINS AND ROBERTSON, JJ., JOIN IN THIS DISSENT.

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,059

MISSISSIPPI PUBLIC SERVICE COMMISSION

v.

MISSISSIPPI POWER COMPANY

BOWLING, JUSTICE, SPECIALLY CONCURRING:

This is designated as a specially concurring opinion, as I understand the entire cause is being remanded to the Public Service Commission pursuant to the opinion this day published by the Court. In the event the matters hereinafter discussed are not material to the issues in the opinion of the Public Service Commission on remand, this might be referred to as a dissent.

The basic terms around which revolve all the lengthy evidence, opinions and briefs in a public utility rate case, such as this, are "rate base" and "rate of return." Many thousands of words are written around those principles. In my humble opinion, they all revolve down to the simple proposition of how much a citizen, poor or rich, should contribute to the public utility in order to keep that utility servicing those citizens. There is one glaring situation that I cannot understand or agree with when the base rate and rate of return of appellee is considered. As stated in the order of the Public Service Commission, appellee Mississippi Power Company, is solely, wholly, completely and totally owned by The Southern Company, a holding utility company based in another state. In addition to appellee company, this Southern Company owns three other local utility companies comparable to appellee Mississippi Power Company. This includes Gulf Power Company that appeared prominently in the present cause. It might be trite to say that no one could argue with the statement that if one entity completely owns another entity and receives all the profits from the second entity,

the first entity controls the second entity completely. In the case at bar, the Southern Company obviously owns and completely controls Mississippi Power Company. The situation that concerns me now is that The Southern Company published its earnings for the year ending December 1982. These earnings were \$472,300,000 for the twelve months' period as compared to \$326,000,000 for the prior year 1981. It is readily seen that this is an increase of over forty-four percent (44%).

Of course, I do not know the percent of net receipts received by The Southern Company from its four wholly owned subsidiaries. The point I am making is that, in my opinion, under the applicable statutes, it is the duty of the regulatory agency, supervised by the courts, to ascertain the part Mississippi Power Company plays in this tremendous increase in earnings by its alter ego. It should not be any great expenditure of time, money or expertise for this information to be furnished the regulatory agency, which is responsible by law to protect the persons taking care of the "rate base" and "rate of return." The above statement is further brought out by both the opinion of the Public Service Commission and this Court in discussing the questions of the investor who is buying and holding equitable securities on which dividends are paid. As stated, every payment under these equitable securities of Mississippi Power Company goes into the bank account of its owner, The Southern Company.

We are in truth and in fact discussing the requirements and positions of equity owners of The Southern Company, rather than Mississippi Power Company. Certainly under the directions of the applicable statutes the regulatory agency for the people of this case have an obligation to fully investigate the entire picture that resulted in Southern Company's more than forty-four percent (44%) increase in earnings. The inquiry should not be confined to the local subsidiaries "base rate" and "rate of return." A red flag is waved to this writer when he

reads the opinions which grant appellee a rate of return of between nine and ten percent and then reads the published statement of appellee's owner that its earnings have increased more than forty-four percent (44%) within a twelve month period of time during the pendency of this cause.

I therefore concur in remanding the cause to the Public Service Commission, but would specifically call to its attention the statutes and the above set out discussion in the commission's review of the cause.

HAWKINS AND DAN LEE, JJ., JOIN IN THIS
SPECIALLY CONCURRING OPINION.

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

Wednesday, April 27, 1983, Court Sitting

54,059

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

v.

MISSISSIPPI POWER COMPANY

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

MINUTE BOOK "BW" PAGE 275

I, Robert E. Womack, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment rendered by the Court in the case of Mississippi Public Service Commission, et al. v. Mississippi Power Company, #54,059, as the same appears of record on file in my office.

[SEAL]

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Mississippi, this the 11th day of May A.D., 1983.

/s/ Robert E. Womack
Supreme Court Clerk

APPENDIX E

BEFORE THE
PUBLIC SERVICE COMMISSION OF MISSISSIPPI

Docket No. U-2567

MISSISSIPPI POWER COMPANY

IN RE: PETITION FOR CERTIFICATE OF CONVENIENCE AND
NECESSITY FOR THE CONSTRUCTION AND OPERA-
TION OF ADDITIONAL GENERATING FACILITIES AND
ASSOCIATED EQUIPMENT IN JACKSON COUNTY,
MISSISSIPPI, AND ADDITIONAL TRANSMISSION LINE
FACILITIES IN THE COUNTIES OF GEORGE, GREENE,
PERRY, FORREST, JONES AND LAMAR.

ORDER

Came on this day for hearing petition of Mississippi Power Company (Petitioner) for a certificate of public convenience and necessity for the construction, operation and maintenance of certain generation and transmission facilities, together with appurtenances thereto, and for acquisition of such land or land rights as may be necessary, and the Commission having heard the same on oral and documentary, evidence, finds:

I.

Petitioner is a public utility as defined in Section 1 D(1) of Chapter 372, Laws of Mississippi of 1956, as amended, (the Act), and is engaged in the generation, transmission and distribution of electric power to and for the public for compensation in the southeastern portion of Mississippi, including Jackson County. It holds a certificate of convenience and necessity issued by this Commission in Docket U-99 pursuant to Section 5(b) of the Act and a certificate of convenience and necessity issued by this Commission on May 17, 1971 in Docket U-2080.

II.

The said certificate issued by this Commission in Docket U-2080 authorized the acquisition of a site for and the construction thereon of a steam electric generating plant consisting, as of the date of such certificate, of one 500 megawatt generating unit. Pursuant to the authority therein granted Petitioner has acquired a site in Jackson County, Mississippi, adjacent to the Pascagoula River at a location approximately ten miles north of the City of Pascagoula, and construction of said facilities has now begun. Unit 1 of said plant is scheduled for commercial operation in 1976.

III.

By the petition in this proceeding Petitioner proposes to construct on said site a second generating unit, of 500 megawatt capacity, together with step-up transformation facilities, other accessories and appurtenances, and transmission facilities emanating therefrom as hereinafter described.

IV.

A forecast of loads upon the Petitioner's system indicates that there is a need for the installation of additional generating capacity at Petitioner's Jackson County Steam Electric Generating Plant, and that an additional 500 megawatt unit in the said Generating Plant, scheduled for initial commercial use in 1978, is appropriate to meet said loads.

V.

Petitioner also proposes to construct additional 230 KV transmission line facilities emanating from said plant and extending through or into the counties of Jackson, George, Greene, Perry, Forrest, Jones, and Lamar, the approximate locations thereof being shown on Exhibits 2 through 8 to the petition in this proceeding, said exhibits being incorporated herein by reference.

VI.

The estimated cost of the facilities for which a certificate is sought in this proceeding totals \$101,077,000, approximately \$89,000,000 of which amount is for generating facilities, and the balance for transmission facilities. Petitioner proposes to finance the construction of these facilities with the use of reserve funds on hand for such purpose and with the proceeds of securities which it will issue from time to time as needed.

VII.

Petitioner proposes to commence construction of the generating facilities herein authorized during the calendar year 1973 and to complete the same on or before June 1, 1978. Petitioner further proposes to commence the construction of transmission facilities at varying dates, commencing with the calendar year 1973, the completion date for all transmission facilities herein authorized being scheduled to be effected on or before June 1, 1978.

VIII.

Petitioner proposes to use oil as the principal fuel for operation of said Unit 2 of the Jackson County Steam Electric Generating Plant, and an adequate supply therefor is available together with adequate means for transportation of oil to the plant site.

IX.

The Commission has full jurisdiction in the premises, and public convenience and necessity exists for the construction and operation by Petitioner of the aforesaid facilities.

X.

Petitioner is ready, willing and able to construct and operate the said facilities.

XI.

To the extent that facilities herein authorized lie within a geographical area which is embraced within the certificate of convenience and necessity held by other electric utilities, Petitioner is authorized to use said facilities for generation, for the supply of plant and construction requirements at the plant site, and for transmission purposes only, subject, however, to such other and further order under the Act as the Commission may see fit to prescribe.

IT IS THEREFORE ORDERED that Petitioner be and it is hereby granted a certificate of convenience and necessity to construct, operate and maintain, and to acquire land and land rights therefor, the facilities herein above described; and that this order shall constitute such certificate of public convenience and necessity.

DONE BY ORDER OF THE COMMISSION on this the 5th day of June, 1973.

[SEAL]

/s/ E. W. Robinson
E. W. ROBINSON
Executive Secretary

CC: List on File

APPENDIX F
BEFORE THE
PUBLIC SERVICE COMMISSION OF MISSISSIPPI
U-3168

MISSISSIPPI POWER COMPANY

**IN RE: PETITION OF MISSISSIPPI POWER COMPANY FOR
APPROVAL OF PROPOSED SALE TO GULF POWER
COMPANY OF ONE-HALF UNDIVIDED INTEREST AS
TENANT IN COMMON IN PETITIONER'S JACKSON
COUNTY STEAM PLANT.**

ORDER

Came on this day for hearing petition of Mississippi Power Company, (Petitioner), a corporation, for approval of a proposed sale to Gulf Power Company (Gulf), a corporation, of a one-half undivided interest as tenant in common in Petitioner's Jackson County, Mississippi steam plant; upon protests by John M. Ford, John R. McNeal, Jr. and John W. Sims, Jr. filed in the said proceeding and Petitioner's response thereto and upon the Supplemental Petition of Petitioner, and the Commission having heard and considered the same on oral and documentary evidence, and being fully informed in the premises finds:

1. Due notice of the filing of said petition and supplemental petition and of the order fixing the date of hearing thereof have been published in the manner provided by law and the Commission has jurisdiction over the parties hereto and the subject matter hereof.

2. Petitioner is a public utility as described in Chapter 372, Laws of Mississippi of 1956 as amended (the "Act") and is engaged in the generation, transmission and distribution of electric power to and for the public for

compensation in 23 counties in Southeast Mississippi, including Jackson County. It holds a certificate of convenience and necessity issued under the grandfather clause of the Act in Docket U-99. It also holds two certificates of convenience and necessity authorizing it to construct, operate and maintain at a location in Jackson County, Mississippi, approximately ten (10) miles north of Pascagoula, a steam electric generating plant to consist of two 500 MW units, such certificates were issued in Docket U-2080 and U-2567.

3. Petitioner commenced the construction of the Jackson County Plant and, after having suspended construction during 1975 for financial reasons, has resumed said construction. Unit 1 of said plant is scheduled to go into commercial operation in 1977 and Unit 2, upon which construction has also begun, to go into service in 1980.

4. Petitioner has determined that, as a result of energy conservation efforts and as a result of unanticipated economic conditions which have reduced the Petitioner's expected rate of growth in kilowatt demand, Petitioner will not, as it initially considered that it would, need the entire amount of the scheduled 1,000 MW of generating capacity at the Jackson County Plant within the time period initially estimated.

5. Gulf is engaged in the business of generation, distribution and transmission of power in the panhandle area of Florida and has its principal office in the City of Pensacola, Florida. Gulf has entered its appearance in this cause and is ready, willing and able to comply with the commitment contained in the letter agreement between Petitioner and Gulf, a copy of which has been filed with the Commission in this proceeding, dated July 28, 1976. Gulf and Petitioner are both operating subsidiaries of The Southern Company and both receive engineering, design, financial and other services from Southern Company Services, Inc. (formerly Southern

Services, Inc.) which renders the aforesaid services to Gulf and Petitioner at cost. Gulf's forecast of estimated demand on its system shows that it will need approximately 500 MW of additional generating capacity available for its operation in 1980 and desires to secure such additional capacity by means of its purchase of a one-half undivided interest in Petitioner's Jackson County Plant.

6. Petitioner has agreed with Gulf upon a plan whereby Gulf will acquire a 50% undivided interest as tenant in common with Petitioner owning the remaining 50% in the Jackson County Plant. The basic structure of such agreement is as follows:

a) Gulf will immediately purchase from Petitioner a 50% undivided interest as tenant-in-common to the common plant site and 100% of the site on which Unit 2 is located.

b) Gulf will also bear 50% of the cost for the construction of items of property common to the operation of both units.

c) Gulf will pay Petitioner the total amount that Petitioner has thus far expended for construction of Unit 2 and will make all future payments that are required for the construction and completion of Unit 2.

d) Petitioner will continue to pay all costs with respect to the construction and completion of Unit 1, which is now substantially complete.

e) After Unit 2 has been completed, the necessary adjustments will be made so that each party will have ownership of 50% of the total Jackson County Steam Plant facilities, including land.

f) Petitioner will operate the plant and, after Unit 2 commences operation, Gulf will reimburse Petitioner for 50% of all costs incurred in the operation of the plant

and will be entitled to 50% of the total output of the plant.

7. Petitioner is unable to finance the completion of Unit 2 by itself alone. The proposed transaction will relieve Petitioner of a substantial financial burden which it would otherwise incur in the completion of Unit 2 for its own account.

8. The Petitioner's reserve generating capability will be adequate for reliable service without the 500 MW capacity proposed to be sold to Gulf. Gulf will be able to acquire 500 MW capacity for use in 1980 at a total cost less than it would have to incur were it to commence now a 500 MW unit for service in 1980.

9. The best economic interest of Petitioner and its consumers will be served by effecting the proposed transaction and public convenience and necessity requires and will require that the proposed sale to Gulf of a one-half interest in Petitioner's Jackson County generating plant be approved.

10. Gulf does not now and will not after the proposed sale is consummated distribute or sell electric energy to any person or user within the State of Mississippi.

IT IS THEREFORE ORDERED that the proposed sale by Petitioner to Gulf of a 50% undivided one-half interest as tenant in common in Petitioner's Jackson County generating plant be and the same is hereby approved. This Order shall be effective from and after its issue.

DONE BY ORDER OF THE COMMISSION this the 27th day of August, 1976.

[SEAL]

/s/ E. W. Robinson
E. W. ROBINSON
Executive Secretary

cc: List on File

APPENDIX G

MISSISSIPPI CODE OF 1972

§ 77-3-33. Rates, classifications and services of utilities.

(1) No rate made, deposit or service charge demanded or received by any public utility shall exceed that which is just and reasonable. Such public utility, the rates of which are subject to regulation under the provisions of this article, may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person. Rates prescribed by the commission shall be such as to yield a fair rate of return to the utility furnishing service, upon the reasonable value of the property of the utility used or useful in furnishing service.

(2) Such utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service. The commission may, after hearing upon reasonable notice had, upon its own motion or upon complaint, ascertain and fix just and reasonable standards, regulations and practices of service which are to be furnished, imposed, observed and followed by all public utilities. The commission may require the service, rules and regulations of each public utility to be filed with the commission and subjected to its approval or to such changes therein as the commission reasonably may require. Practices required or sanctioned pursuant to the provisions hereof shall supersede other requirements of law.

(3) Such utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons, rates, deposits and service charges. The classification may, in any proper case, take into account the nature of the use, the quantity and quality used, the time when used, the purpose for which used, and any other reasonable consideration.

APPENDIX H

U.S. CONSTITUTION

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

IN THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI

No. 116,202

MISSISSIPPI POWER COMPANY,
Appellant
vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Appellee

ASSIGNMENT OF ERRORS

Comes now Mississippi Power Company, Appellant, by its counsel, and assigns the following actions of the Mississippi Public Service Commission in this cause as error:

1. The findings of the Mississippi Public Service Commission that proposed rates of Appellant are unreasonable and excessive are erroneous and are not supported by any credible evidence in the record and are contrary to the overwhelming weight of the evidence.
2. The Commission erred in allowing to Appellant a level of rates which would produce only 27.7% of the increase in revenues of \$10,877,000 specified in the notice of change in rates, said finding being wholly unsupported by the evidence and contrary to the overwhelming weight of the evidence.
3. The order of the Commission herein appealed from is confiscatory and therefore void.
4. The Commission has denied to Appellant the equal protection of the laws contrary to the 14th Amendment to the Constitution of the United States in that it denied to Appellant the benefit of specific rulings which the Com-

mission itself had made in other recent rate proceedings before the Commission.

5. The Commission's order deprives the Appellant of its property without the due process of law in contravention of Section 14 of the Constitution of the State of Mississippi and Amendment 14 of the Constitution of the United States.

6. Specifically the Commission erred in reducing Appellant's rate base by \$1,138,500 representing the difference in cost of coal cars for Plant Daniel bought by Appellant as contrasted to those bought by Gulf Power Company. Pages 6-7 of the Commission's order.

7. The Commission erred in reducing the rate base of Appellant by \$19,000,000 because of alleged excess cost of Unit 2 of Plant Daniel over the cost of Unit 1. Page 19 of the Commission's order.

8. The Commission erred in reducing the fuel stock balance of Appellant from \$69,187,000 to \$40,278,000. Pages 12-14 of the Commission's order.

9. The Commission erred in using Staff Witness Clark's actual balance of plant account at the beginning of the test year rather than the projected balances used by MPCo. Page 12 of the Commission's order.

10. The Commission erred in reducing Appellant's rate base by removing therefrom average balance of property damage reserve, injuries and damages reserve and customer advances for construction. Page 10 of the Commission's order.

11. The Commission erred in reducing Appellant's rate base in the amount of \$18,354,000 by deducting therefrom construction work in progress with respect to non-revenue producing items. Page 11 of the Commission's order.

12. The Commission erred in reducing Appellant's rate base by the amount of pre-1971 accumulated investment tax credits. Page 11-12 of the Commission's order.

13. The Commission erred in disallowing Appellant's calculated amount of necessary cash working capital and in the use of the Staff Witness Clark's alleged lead-lag study. Page 17 of the Commission's order.

14. The Commission erred in ordering an amortization by Appellant in two years of an alleged "excess deferred income tax reserve". Pages 2, 14-15 of the Commission's order.

15. The Commission further erred with respect to Appellant's alleged "excess deferred income tax reserve" because the effect of its order results in a permanent reduction in required revenues beyond the expiration of the two year amortization period. Pages 14-15 and 21 of the Commission's order.

16. The Commission erred in arbitrarily reducing Appellant's projected maintenance expense for the test year. Pages 23-24 of the Commission's order.

17. The Commission erred in holding that revenue requirements should be reduced by virtue of consolidated income tax return savings. Page 21 of the Commission's order.

18. The Commission's determination of Appellant's cost of capital and allowed rate of return is unreasonable, unsupported by any evidence in this case, and is contrary to the overwhelming weight of the evidence.

19. The Commission erred in finding that the revenues allowed by the Commission in its order will be adequate to provide required preferred stock coverage for Appellant. Page 32 of the Commission's order.

20. The Commission erred in making the following rulings with respect to receipt and/or rejection of evidence,

which rulings are found in the following record references:

<u>VOL.</u>	<u>PAGES</u>
IX	797
XI	1069, 1070, 1071, 1072, 1074, 1075, 1076, 1077, 1078, 1079
XIII	1269, 1270, 1271, 1272
XXII	2249

Respectfully submitted,

JAMES S. EATON, ESQ.

BEN H. STONE, ESQ.

EATON, COTTRELL, GALLOWAY
& LANG

P. O. Drawer H
Gulfport, MS 39501

H. H. WHITWORTH, ESQ.

WATKINS & EAGER
P. O. Box 650
Jackson, MS 39205

by: /s/ [Illegible]
Of Counsel

APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. 54,059

MISSISSIPPI PUBLIC SERVICE COMMISSION and
MISSISSIPPI LEGAL SERVICES COALITION, and others,
Appellants

vs.

MISSISSIPPI POWER COMPANY,
Appellee

PETITION OF MISSISSIPPI POWER COMPANY
FOR REHEARING

COMES NOW Mississippi Power Company (MPC), appellee in the above styled and numbered cause, by its counsel of record, and moves the Court to set aside the Majority Opinion rendered in this case, both Part I and Part II, on March 23, 1983, and grant appellee a rehearing, and in support thereof would respectfully show unto the Court the following:

1. In Part I of the Majority Opinion (p.p. 2-12), the Court erred in reversing the action of the Chancellor wherein the Chancellor held that the PSC's action in reducing MPC's rate base by the sum of \$20,138,500 as a result of the transaction between MPC and Gulf Power Company respecting Plant Daniel * was an abuse of discretion and was not supported by the evidence, which er-

* \$19,000,000 of the total of \$20,138,500 is discussed in Part I of the Majority Opinion on pp. 2-12, but the Majority Opinion fails to affirm or reverse the Chancellor's ruling reversing the order of the PSC which reduced the rate base of MPC in the sum of \$1,138,500 because of the transfer of certain interests in coal cars which serve Plant Daniel.

ror deprives MPC of its property without due process of law in contravention of § 14 of the Mississippi Constitution of the United States.

2. In Part II of the Majority Opinion (p.p. 34-38) the Court erred in reversing the action of the Chancellor wherein the Chancellor held the PSC committed reversible error in failing to grant to MPC 10.595% overall return on MPC's retail rate base, because the Majority Opinion fails to even discuss or recognize the undisputed proof in the record that the staff witness, Wilson, failed and refused to use "the most recent and precise information" which was available to him reflecting dividends and stock prices in Wilson's own DCF formula for determining the cost of common equity. (For phrase in quotation marks, See p. 29 of Majority Opinion).

3. In Part II of the Majority Opinion (p.p. 21-23), the Court erred in reversing the action of the Chancellor wherein the Chancellor held the PSC committed reversible error in failing to allow \$8,804,000 in MPC's rate base for non-revenue producing CWIP, because the Court should have remanded this issue back to PSC and given MPC a chance to introduce data showing a "break-down" of the construction items making up this sum and the date on which each such construction item would have been completed during the test year.

4. In Part II of the Majority Opinion (p.p. 32-34), the Court erred in reversing the action of the Chancellor wherein the Chancellor found the PSC had committed reversible error in reducing from MPC's rate base the total amount of the average balances of the accounts for property insurance reserves and injuries and damages reserves, because the Court failed to discuss and failed to understand that the annual amounts which are accrued by accounting entries to these reserve accounts represent amounts which otherwise would be utilized for payment of insurance premiums, which premiums, if paid, the Court recognized as expense items and which would be

reflected in the income and expense statements and would directly affect net profits and revenue deficiencies.

5. In Part II of the Majority Opinion (p.p. 30-32), the Court erred in reversing the action of the Chancellor wherein the Chancellor found the PSC had committed reversible error in deducting from MPC's rate base the sum of \$1,757,297 which sum represented the average balance of pre-1971 accumulated investment tax credits, because the Majority Opinion completely ignores the PSC's own order in docket U-782, dated February 13, 1963, Ex. 72 (XIII, 1873-4) in the Record, which order directs that utilities, including MPC, amortize investment tax credits over the useful life of the property which gave rise to such credits, and the Majority Opinion fails to require PSC to abide by its own order.

6. In Part II of the Majority Opinion (p.p. 12-15), the Court erred in reversing the Chancellor's reinstatement of MPC's original request for maintenance expenses in the test year, and instead the Court should have affirmed the Chancellor on this issue and remanded the case on this issue to the PSC with specific directions to amend its order so as to recognize and accept the actual maintenance expenses for the twelve-month period ended December 31, 1980 as a part of the basis for the trended analysis.

7. In Part II of the Majority Opinion (p.p. 15-20), the Court erred in reversing the action of the Chancellor wherein the Chancellor found the PSC had committed reversible error in reducing the cash working capital component of MPC's rate base by the sum of \$25,191,000, and instead the Court should have affirmed the Chancellor on this issue and remanded the case on this issue to the PSC with specific instructions to amend its order restoring to MPC's rate base the sum of \$25,191,000, because on remand neither the staff of the PSC nor witnesses of MPC could present additional or further evidence on this

issue which was not presented in the original hearings
and is presently found in the Record.

Respectfully submitted,

MISSISSIPPI POWER COMPANY,
Appellee

BY: JAMES S. EATON
BEN H. STONE
EATON, COTTRELL, GALLOWAY
& LANG
2300 14th Street
P. O. Drawer H
Gulfport, Mississippi 39501

HASSELL H. WHITWORTH
WATKINS & EAGER
800 Peoples Bank Building
P. O. Box 650
Jackson, Mississippi 39205

By /s/ James S. Eaton
Of Counsel

CERTIFICATE

I, the undersigned, hereby certify that a copy of the foregoing Petition for Rehearing has been this day mailed, postage prepaid, to the following:

Hon. Bennett Smith
Mississippi Public Service Commission
P. O. Box 1174
Jackson, MS 39205

Maurice Dantin, Esq.
Hall, Callender & Dantin
P. O. Box 604
Columbia, MS 39429

John L. Maxey, Esq.
Cupit & Maxey
P. O. Box 22666
Jackson, MS 39205

This the 14th day of April, 1983.

/s/ James S. Eaton
Of Counsel for Appellee

JUN 29 1983

ALEXANDER L. STEWART

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1907

MISSISSIPPI POWER COMPANY,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
THE UNITED STATES OF AMERICA.

Respondents.

**BRIEF OF MISSISSIPPI PUBLIC SERVICE
COMMISSION IN OPPOSITION TO WRIT OF
CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI**

BENNETT E. SMITH
COUNSEL OF RECORD
ASSISTANT ATTORNEY GENERAL
P. O. Box 1174
Jackson, Mississippi 39205
(601) 961-5437

MAURICE DANTIN
HALL, CALLENDER & DANTIN
P. O. Box 604
Columbia, Mississippi 39429
(601) 736-5378

*Attorneys for Mississippi
Public Service Commission*

June 20, 1983

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1907

MISSISSIPPI POWER COMPANY,
Petitioner,

V.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
THE UNITED STATES OF AMERICA.
Respondents.

**BRIEF OF MISSISSIPPI PUBLIC SERVICE
COMMISSION IN OPPOSITION TO WRIT OF
CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI**

BENNETT E. SMITH
COUNSEL OF RECORD
ASSISTANT ATTORNEY GENERAL
P. O. Box 1174
Jackson, Mississippi 39205
(601) 961-5437

MAURICE DANTIN
HALL, CALLENDER & DANTIN
P. O. Box 604
Columbia, Mississippi 39429
(601) 736-5378

*Attorneys for Mississippi
Public Service Commission*

June 20, 1983

INDEX

	Page
I. THE ACTION OF THE MISSISSIPPI PUBLIC SERVICE COMMISSION WAS SUPPORTED BY THE EVIDENCE	2
II. PETITIONER WAS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW	6
III. THERE ARE NO STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED	9
IV. CONCLUSION	10
CERTIFICATE OF SERVICE	10

ALPHABETICAL TABLE OF CASES AND AUTHORITIES:

CASES CITED:	Page
<i>Bluefield Water Works Co., v. Public Service Comm. of West Va.</i> , 262 U. S. 679, 67 L. ed. 1176 (1922)	6,7
<i>Chicago Milwaukee & St. Paul Railroad Co. v. Public Utilities Comm.</i> , 274 U. S. 344 71 L. ed. 1085, 1090 (1927)	6,8
<i>Federal Power Comm. v. Hope Natural Gas Co.</i> , 320 U. S. 519, 88 L. ed. 333 (1944)	7
<i>Laclede Gas Light Co. v. Public Utilities Comm. of Missouri</i> , 8 F. Supp. 806, 6 PUR (NS) 72, (3 Judge District Court, MO) (1934)	7,8
<i>Los Angeles G. & E. Corp. vs. Railroad Com.</i> , 289 U. S. 287, 53 S. Ct. 637, 77 L. ed. 1180 (1932)	6
<i>Mississippi Public Service Commission v. Mississippi Power Co.</i> , 33 So. 2d. 936 (Miss. 1976)	6
<i>Northern P. R. Co. v. Dept. of Public Works</i> , 268 U. S. 39-44, 69 L. ed. 837-84 (1925)	7,8
<i>Ohio Bell Telephone Co. v. Public Utilities Comm.</i> 301 U. S. 292, 81 L. ed. 1093 (1937)	7,8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NO. 82-1907

MISSISSIPPI POWER COMPANY,
Petitioner

V.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
INTERNATIONAL PAPER COMPANY,
THE UNITED STATES OF AMERICA,
Respondents.

**BRIEF OF
MISSISSIPPI PUBLIC SERVICE
COMMISSION IN OPPOSITION TO WRIT OF
CERTIORARI TO THE SUPREME COURT
OF MISSISSIPPI**

Respondent Mississippi Public Service Commission respectfully opposes the petition of Mississippi Power Company for a writ of certiorari to review the judgment of the Supreme Court of Mississippi rendered March 23, 1983, affirming an order of the Mississippi Public Service Commission dated April 16, 1981, and in support thereof shows the following:

I. THE ACTION OF THE MISSISSIPPI PUBLIC SERVICE COMMISSION WAS SUPPORTED BY THE EVIDENCE

The basis of the adjustment by the Mississippi Public Service Commission was explained in its order (Pet. App. A, p. 5a-7a and 18a-19a) and was supported by the evidence. The sale of one-half interest in Plant Daniel Unit 1 to Gulf Power Company and purchase of one-half interest in Plant Daniel Unit 2 from Gulf Power Company had previously been approved by the Commission. But the transaction was approved based upon the cost estimates of the Company which were approximately half of the amount shown at the subject rate hearing. In 1977, the Company reported that the cost to Mississippi Power Company would ultimately amount to \$16,000,000; the amount actually proposed as a rate base addition was \$38,000,000. The previous order of the Commission simply stated that after Unit 2 was completed "the necessary adjustment" would be made so that each party could have a 50% ownership interest in both units and the common facilities. (Pet. App. F, par. 5e, p. 101a)

The evidence showed that the increase was due to cost overruns and construction delays of Gulf Power Company and not Mississippi Power Company. Therefore, the Commission found that such increase should be borne by the ratepayers of Gulf Power Company and not Mississippi Power Company. The Commission found the Mississippi Power Company ratepayers would obtain absolutely no gain in capacity, i.e., out of Plant Daniel Mississippi Power Company had 500 Mw. After the transfers,

Mississippi Power Company would still have 500 Mw. from Plant Daniel. It is Gulf Power Company that will own and have access to an additional 500 Mw. Mississippi Power Company will be no better off from a power supply position. The only change to Mississippi Power Company ratepayers would be that they would have to pay rates on a rate base increased by \$38,000,000. The Company failed to even claim credit for the enhanced value of Unit 1 because of the inflation it so frequently embraced in justifying its increased costs. The only advantage the Company could cite was that Plant Daniel Unit 2 would be a few years younger and that there would be some increased reliability. The evidence shows that such a contention was not quantified, and especially in view of the Company's participation in the Southern Pool (sharing of excess power by all of the Southern companies), was minimal. The Company had shown that the plant accounts would increase \$38,000,000 and, as stated above, half of that amount was attributable to cost overruns and construction delays of Gulf Power Company. Consequently, the Commission ordered that the Company's total rate base be reduced by half of the cost or \$19,000,000. The action of the Commission was supported by the testimony of Dr. John Wilson, which was as follows, to wit:

"I have revised the Company's proposed test year adjustment to account for the increased cost of Unit No. 2 of the Jackson County plant. Pursuant to the Commission's Order of August 27, 1976 in Docket U-3168, MPCo sold a one-half undivided interest as tenants in common in its Jackson County Steam Plant to Gulf Power, an

affiliated member of the Southern Company. This transaction was proposed due to MPCo's earlier overestimate of its own generation capacity requirements and Gulf's corresponding need for more capacity at a time when MPCo Jackson County plant was under construction. The Commission approved the proposed sale based on the belief that it would be in the best economic interest of both the Company and its customers. The financial details of the proposed transaction were not specified and approved in the Commission's 1976 order. The order simply stated that after Unit 2 was completed "the necessary adjustments" would be made so that each party would have a 50% ownership interest in both units and the common facilities. No financial details as to "the necessary adjustments" were specified. It is clear, however, that the Commission did contemplate that the transaction, as ultimately consummated, would be economically beneficial to all concerned and would thus serve the public.

"It is questionable that the specific financial details as proposed by MPCo for ratemaking treatment in this case was consistent with the Commission's 1976 determination that the transaction be in the best economic interest of both the Company and its customers. The end result of the Company's proposed ratemaking treatment here is to substantially increase the financial burden of Mississippi consumers without giving them one more kilowatt of electricity. This result occurs because upon completion of Unit 2 at the Jackson County

Steam Plant, which has been owned and financed by Gulf pursuant to the Commission's approval in 1976, MPCo will, in effect, trade Gulf a half interest in its own Unit 1 for a half interest in Unit 2. Of course, since Unit 1 was completed about four years earlier than Unit 2, Unit 2 is more costly and thus the trade results in a substantial increase in the cost of MPCo's rate base without any addition of capacity.

"The excess cost of Unit 2 over Unit 1 was more than was contemplated at the time the commission approved the transaction. The Company reported in 1977 that the cost of MPCo would ultimately amount to \$16,000,000.00, the amount actually proposed as a rate base additional in this case is \$38,000,000.00. **While the Commission may determine that an appropriate rate base adjustment is warranted in this regard**, I believe that, at a minimum, the cost-over-run should be considered in arriving at the allowed rate of return in this case and that such consideration warrants a return allowance at the bottom on the application range." (Emphasis added)

In evaluating the interest of the ratepayers of Mississippi Power Company in the total Plant Daniel transaction, it was appropriate for the Commission to consider the tremendous reserve capacity of Mississippi Power Company which was 50% in 1979, 34% in 1980, and 40% in 1981.

For the same reason the Commission was justified in reducing the Company's rate base by the amount of \$1,138,500 which represented the dif-

ference in the cost of coal cars originally purchased by the Company for use in operating Unit 1 and the cost of coal cars to Gulf Power Company several years later obtained for use in providing fuel for Unit 2 of Plant Daniel.

Making such adjustments is not only the prerogative of the Commission - it is the duty of the Commission. As stated in **Mississippi Public Service Commission v. Mississippi Power Co.**, 33 So. 2d 936 (Miss. 1976), quoting from **Los Angeles G. & E. Corp. vs. Railroad Com.**, 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180 (1932):

"It is the appropriate task of the commission to determine the value of the property affected by the rates it fixes, as that of an integrated operating enterprise, and it is the function of the court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use."

II. PETITIONER WAS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW

The petitioner cites in support of its contention that it had been deprived of property without due process of law the cases of **Bluefield Water Works Co. v. Public Service Comm. of West Va.**, 262 U. S. 679, 67 L. ed. 1176 (1922); **Chicago Milwaukee & St. Paul Railway Co. v. Public Utilities Comm.**, 274 U. S. 344, 71 L. ed. 1085, 1090

(1927); **Federal Power Comm. v. Hope Natural Gas Co.**, 320 U. S. 519, 88 L. ed. 333 (1944); **Laclede Gas Light Co. v. Public Utilities Comm. of Missouri**, 8 F. Supp. 806, 6 PUR (NS) 72, (3 Judge District Court, MO.) (1934); and **Northern P. R. Co. v. Dept. of Public Works**, 268 U. S. 39-44, 69 L. ed. 837-84 (1925); **Ohio Bell Telephone Co. v. Public Utilities Comm.**, 301 U. S. 292, 81 L. ed. 1093 (1937).

The **Bluefield v. Public Service Comm.**, *supra*, case is indeed one of the landmark cases of utility regulation, for it establishes the standards of a fair return. It also specifies that this ascertainment is not controlled by artificial rules or formulas, but upon a proper consideration of all of the relevant facts. This is precisely what the Mississippi Public Service Commission did - evaluate all of the facts pertaining to Plant Daniel and not just the figure the Company placed in rate base. There was certainly no deliberate underevaluation of property without evidentiary support. There was deliberate evaluation on the basis of the evidence and testimony presented to the Commission. As shown above the testimony of Dr. John Wilson was ample evidentiary support and the order of the Commission recited the reason for its action.

The **Federal Power Commission v. Hope Natural Gas Co.**, *supra*, case is also noteworthy in the field of utility regulation. It enunciates the standard of return to the equity owner but it also makes it plain that the regulatory body has great discretion in determining any rate base on which a return is to be computed. It is sound authority for the action taken by the Mississippi Public Service Commission

in the instant case.

The cases of **Northern Pacific R. Co. v. Dept. of Public Works**, *supra*, **Chicago M. & St. Paul Railway Co. v. Public Utilities Comm.**, *supra*, and **Laclede Gas Light Co. v. Public Utilities Comm. of Missouri**, *supra*, are all cases which hold that it is a denial of due process to value property for rate making purposes without evidence. There is no argument with the holdings of any of these cases. They simply are not applicable to the case of the petitioner, for there was testimony and additional evidence supporting the action of the Commission.

Neither is the case of **Ohio Bell Telephone Co. v. Public Utilities Comm.**, *supra*, relevant to the present matter. It deals with the denial of due process because the Commission failed to give proper notice and hearing. The petitioner attempts to link the cases because of a previous certificate from the Mississippi Public Service Commission authorizing the construction. But as hereinabove shown, that certificate was predicated upon evidence that the cost would be half of what was ultimately claimed. And the Mississippi Public Service Commission only reduced the claimed amount by half. The first opportunity that the Commission had of knowing what would be claimed by the Company was when it filed its petition for rate increases. The staff witness, Dr. John Wilson, whose testimony is reproduced above, testified that it would be appropriate for the Commission to make the adjustment. And the Company had opportunity to and did present contradicting evidence in its rebuttal portion of the hearing. There is no showing in this record of a lack of notice or hearing which violates due process.

III. THERE ARE NO STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

Rule 19 indicates that the court will consider a review on writ of certiorari where a state court has decided a federal question of substance not theretofore determined by the court, or has decided it in a way probably not in accord with applicable decisions of this court. The Mississippi Supreme Court in this case has not decided a federal question of substance not theretofore determined by this court. It has not rendered a decision in a way probably not in accord with the applicable decisions of this court. It has only determined that the Mississippi Public Service Commission made a rate base adjustment which was supported by the evidence.

The petitioner filed for rate increases with the Mississippi Public Service Commission. After proper notice and a full hearing, the Mississippi Public Service Commission determined from the evidence and testimony in its finding of fact that the petitioner's claim for allowance of Plant Daniel in its rate base was excessive and reduced same by half. This adjustment was supported by the evidence and the specific testimony of staff witness, Dr. John Wilson. It is authorized by statutory and case law and is a routine function of regulatory commissions. This adjustment to rate base under the facts, testimony and evidence is certainly no issue of great public importance.

IV. CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to the Supreme Court of Mississippi.

Respectfully submitted,

BENNETT E. SMITH
MISSISSIPPI PUBLIC
SERVICE COMMISSION
P. O. BOX 1174
JACKSON, MISSISSIPPI 39205

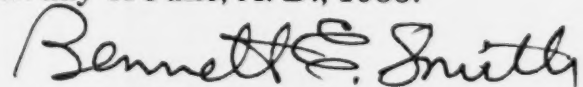
MAURICE DANTIN
HALL, CALLENDER & DANTIN
P. O. BOX 604
COLUMBIA, MISSISSIPPI 39429
ATTORNEYS FOR MISSISSIPPI
PUBLIC SERVICE COMMISSION

by: /s/ BENNETT E. SMITH
COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I, Bennett E. Smith, counsel of record for the Mississippi Public Service Commission, do hereby certify that I have this date served a true and correct copy of the foregoing Brief Of Mississippi Public Service Commission In Opposition To Writ Of Certiorari To The Supreme Court Of Mississippi on Honorable Hassell H. Whitworth, Watkins & Eager, P. O. Box 650, Jackson, Mississippi 39205, Honorable Ben H. Stone, Eaton, Cottrell, Galloway & Lang, P. O. Drawer H, Gulfport, Mississippi 39501, and Honorable John L. Maxey, II, Cupit & Maxey, P. O. Box 22666, Jackson, Mississippi 39205, by United States mail, postage prepaid.

THIS the 20th day of June, A. D., 1983.



/s/ BENNETT E. SMITH
OF COUNSEL for RESPONDENT